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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LEASE LIGHTS, INC., JACK R. SEAY, d/b/a SEAY ELECTRIC COMPANY, KNIGHT LIGHTS COMPANY, INC., and PROTECTIVE LIGHTING, INC.,
Petitioners

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does antitrust immunity under the Parker state-action doctrine extend to the involvement of a public utility in a separate non-utility business which the highest State Court has held to be outside the power of the State Commission to regulate?

2. Has the state exercised an active role of supervision pursuant to affirmatively-expressed and clearly-articulated legislative policy so as to confer state-action immunity from antitrust laws, when the State Commission regulates only the public utility which is otherwise under its jurisdiction and does not regulate other major competitors in the same non-utility business?

3. Is the unauthorized and unlawful tariff approval by a State Commission a shield from antitrust laws until such action is adjudged unlawful?

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PUBLIC SERVICE COMPANY OF OKLAHOMA
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lease Lights, Inc., Jack R. Seay, d/b/a Seay Electric Company, Knight Lights Company, Inc., and Protective Lighting, Inc., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals, reported at 849 F.2d 1330 is reproduced at App. A-1.

JURISDICTION

The judgment of the Court of Appeals was entered June 27, 1988. Petition for rehearing was denied by order dated August 16, 1988 (App. A-13). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Code, Title 15, § 2

United States Code, Title 15, § 15

United States Code, Title 28, § 1738

Oklahoma Constitution, Article IX, § 18

Oklahoma Constitution, Article IX, § 34

Oklahoma Statutes, Title 17, § 151

Oklahoma Statutes, Title 17, § 152

(App. B)

STATEMENT OF THE CASE

The questions presented are of importance in the administration of the antitrust laws throughout the nation insofar as they apply to public utilities and other regulated businesses which often penetrate competitive areas beyond the sphere of their monopolies. The decision of the Court of Appeals is in conflict with numerous decisions of this Court as pointed out herein. Federal jurisdiction in the District Court is based on 15 USC §2, 15, 22 and 28 USC §1337.

The decision of the Court of Appeals should be reviewed because it represents an unjustified enlargement of an exemption to the federal antitrust laws created by decisions of the U. S. Supreme Court. The U. S. Supreme Court always has been

recognized as the protector of the public policies embodied in the antitrust laws. If the doctrine of state-action immunity is to be expanded, it should be done by the U. S. Supreme Court and not by the circuit courts while disregarding clear and compelling decisions of this Court.

This case is a sequel to numerous decisions of the U.S. Supreme Court involving enforcement of Federal anti-trust laws regarding intrusions by public utilities and other state-regulated businesses into private competitive markets outside the realm of their regulated businesses. Recent principal decisions of the U.S. Supreme Court dealing with application of the doctrine of state-action immunity to such activities are: *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 49 L.Ed.2d 1141, 96 S.Ct. 3110 (1976); *Bates v. State Bar of Arizona*, 433 U.S. 350, 53 L.Ed.2d 810, 97 S.Ct. 2691 (1977); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 55 L.Ed.2d 364, 98 S.Ct. 1123 (1978); *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97, 63 L.Ed.2d 233, 100 S.Ct. 937 (1980); *Southern Motor Carriers Rate Conf. v. U.S.*, 471 U.S. 48, 85 L.Ed.2d 36, 105 S.Ct. 1721 (1985); *324 Liquor Corp. dba Yorkshire Wine & Spirits v. Duffy*, 479 U.S. 335, 93 L.Ed.2d 667, 107 S.Ct. 720 (1987); *Patrick v. Burget*, 486 U.S. _____, 100 L.Ed.2d 83, 108 S.Ct. _____ No. 86-1145 (1988).

The Supreme Court, by these decisions, has given immunity from the antitrust laws to persons engaged in anticompetitive conduct pursuant to policy of a State in its sovereign capacity only if two criteria are satisfied: (1) A policy to replace competition with regulation in the affected market must be clearly articulated and affirmatively expressed by the State Legislature (2) The policy must be actively supervised by the State pursuant to such policy.

The highest court of the State of Oklahoma, in a decision between the same parties preceding trial of this cause, held that outdoor lighting was not a part of the electric utility business and that it was a separate business beyond the power of the Oklahoma Corporation Commission to regulate. *Public Service Company of Oklahoma v. Corporation Commission*, 688 P.2d 1274 (Okl. 1983) (Herein referred to as PSO case, Part VI, the only relevant portion of opinion is reproduced at App. C-1.)

The petitioners are entrepreneurs engaged in the business of leasing outdoor lights in Tulsa County, Oklahoma. PSO, an electric public utility, is in the same business. The utility entered the lighting business of its own volition and was not ordered or directed to do so by the State. PSO has filed tariffs with the Oklahoma Corporation Commission during part of the time it has been in the lighting business, and some of the tariffs have been approved by the Commission. In the early years of its involvement in the lighting business PSO did not file tariffs with the Commission. The earliest commercial and industrial outdoor lighting tariff for which PSO has produced a written order of approval as required by Commission rules is effective May 16, 1975. The order approving that tariff is a blanket order which does not mention or indicate consideration of outdoor lighting. The earliest Commission order that specifically mentions outdoor lighting is dated May 7, 1980. The part of the order approving outdoor lighting was reversed by the Oklahoma Supreme Court which held that such lighting was a separate business beyond the power of the Commission to regulate. Petitioners and Respondent were parties to that case.

PSO is the only Oklahoma utility which has competitors in the business of leasing outdoor lights. Petitioners and competitors other than the utility held approximately 70% of the

commercial and industrial lighting business in the area where PSO allowed them to compete from 1969 to 1975. However, the Commission has never in any way regulated petitioners or any competitors. Regulation by the Commission has been limited to acceptance and sometimes approval of the utility's tariffs even though other independent competitors have held a substantial share of the market.

The instant case was instituted by petitioners seeking damages under 15 U.S.C. §§ 15 and 22 based upon predatory and anti-competitive conduct on the part of respondent injuring the business of the petitioners and restraining commerce. A jury returned a verdict for the petitioners. Respondent did not file a motion for new trial but filed a motion for judgment N. O. V. which was denied by the District Court, and judgment was entered on the verdict. The Court of Appeals reversed the judgment of the District Court, holding that PSO is immune from the antitrust laws under the State-Action or "Parker" exemption.

REASONS FOR GRANTING THE WRIT

I.

Legislative expression and articulation of policy to replace competition with regulation.

Federal Courts are required to give preclusive effect to judgments of state courts[1]. The Oklahoma Supreme Court, in a case between the same parties entered a judgment which was introduced in evidence at the trial of this case, adjudicating that PSO's outdoor-lighting business was a separate venture and not

[1] 28 USC § 1738; *Migra v. Warren City School Dist. Bd. of Education* 465 U.S. 575, 79 L.Ed.2d 56, 104 S.Ct. 892 (1984).

a part of the electric-utility business and, as such, was beyond the regulatory jurisdiction of the Oklahoma Corporation Commission.

> "The argument revolves substantially around *jurisdiction* of Commission to even deal with PSO's investment in the lighting business . . . PSO case *supra* at p. 1280.
>
> "We hold that a business such as area outdoor lighting is a separate venture of PSO, is not used or useful to the ratepayers as a whole, and thus its investment may not be included in its general rate base. It is similar in nature to the selling of appliances (which are improper under 18 O.S. 1971, § 1.27) at p. 1281."

That judgment constitutes a collateral estoppel which is binding as to the lack of any constitutional or legislative power on the part of the Commission to regulate, and it conclusively adjudicated that there is no legislative policy of the State of Oklahoma in its sovereign capacity to replace competition with regulation in the outdoor-lighting industry. The same provisions of the Oklahoma Constitution (Art. IX, § 18 and § 34) and statutes (17 Okl. Stat. § 151-152) relied upon by the Court of Appeals were before the Oklahoma Supreme Court in the prior case. (See briefs of parties, App. D.) The Court of Appeals' view that the State Court's decision can be interpreted as being based upon insufficiency of evidence is incorrect, for the Commission requested and was denied remand for further evidence, (Comm. Resp. to briefs for rehearing pp. 5-6, and Order den. pet. for rehearing, App. D 8-10.) The Court of Appeals erred in failing to give preclusive effect to the prior judgment of the state court.

Even if the Court of Appeals is not required to give preclusive effect to the judgment of the state court it must

follow state law as declared by state courts[2], and it has erred in its failure to follow the law of the State as declared by the Oklahoma Supreme Court and has completely misconstrued the Oklahoma Constitution and the Oklahoma statutes contrary to their plain wording and contrary to the declaration of the highest State Court. In ignoring decisions of the Oklahoma Supreme Court and proceeding with its own analysis the Court of Appeals erred. This case is not presented to the United States Supreme Court to resolve an error of a Court of Appeals in interpreting matters of state law. These matters were clearly decided by the Oklahoma Supreme Court.

The Court of Appeals stated: " . . . The Oklahoma Constitution gives the Commission the power to regulate public utilities, which it defines as 'all gas, electric, heat, *light*, and power companies . . . ' Okla. Const. art. IX, § 34 (emphasis added) at p. 1333."

The Oklahoma Supreme Court has held in numerous cases that the Oklahoma Constitution granted to the Commission the power to regulate *only transportation and transmission companies* and not public utilities.[3]

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[2] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 82 LEd 1188, 58 S.Ct. 817 (1938).

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[3] " . . . Jurisdiction over gas utilities was not included in that conferred upon the commission by section 18, art. 9, Constitution, relating to transportation and transmission companies . . . But all the powers and duties specified in the Constitution as to transportation and transmission companies, and others in addition thereto, were conferred over gas and other public utilities by chapter 93, Sess. Laws 1913 (now 17 Okl.Stat. § 152)." *Okla. Natural Gas Co. v. State*, 188 P. 338, 340 (Okl. 1920); *Shawnee Gas & Elec. Co. v. Corp Comm. of Okla.*, 130 P. 127 (Okl. 1913); *Oklahoma Gas & Elec. Co. v. Wilson & Co.*, 288 P. 316 (Okl. 1930); *Guthrie Gas, etc., Co. v. Board of*

The interpretation of the Oklahoma Constitution and the Oklahoma statutes contrary to their plain wording and contrary to the prior construction of the same provisions by the Oklahoma Supreme Court are a crucial flaw in the reasoning of the Court of Appeals. The Court of Appeals quotes from *Oklahoma Constitution Article 9 § 34* what it contends is a definition of "public utilities"; however, the quoted definition clearly is a definition of "public service corporations" rather than "public utilities". The term "public service corporations" has no significance, inasmuch as neither the Constitution nor legislation grants any power over them to the Corporation Commission. That fact is clearly stated by the numerous decisions of the Oklahoma Supreme Court previously quoted and cited herein. It is equally clear from said decisions that the only authority of the Oklahoma Corporation Commission to regulate electric utilities (not public service corporations) is granted by the legislature by *17 Okl. Stat. § 152*. That authority is to regulate a public utility as defined by the same legislative Act: "The term 'public utility' as used in §§ 151 through 155 of this title shall be taken to mean [a corporation . . .] that now or hereafter may own, operate or manage any plant or equipment, . . . (c)for the *production, transmission, delivery or furnishing electric current* for light, heat or power." (emphasis added). *17 Okl. Stat. § 151*

It is clear that the electric utility business of the defendant which the Corporation Commission is empowered to regulate is

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Footnote 3 continued from previous page.

Education, 166 P. 128 (Okl. 1917); *City of Durant et al v. Consumers' Light & Power Co.*, 177 P. 361 (Okl. 1918); *Southern Oil Corp. v. Yale Natural Gas Co.*, 214 P. 135 (Okl. 1923); *Muskogee Gas & Electric Co. v. State*, 186 P. 730 (Ok 1920); *Merrill, 50 Years of Public Law In Oklahoma*, Vol. 10 Okl. L Rev. 375.

limited to: "*production, transmission, delivery, or furnishing electric current*". The purposes for which the electricity may be used does not, in any way, enlarge upon the statutory definition of an electric public utility. If the definition can be expanded to include the furnishing of lighting, then it likewise would include the furnishing of heat and power, a definition which would include all possible uses of electricity and which would authorize the utility to take over all segments of industry employing appliances which utilize electricity. This definition of an electric utility obviously was not intended, and such an interpretation would result in dire consequences disruptive to the entire enocomy as pointed out in the dissenting opinion of Corporation Commissioner Dawson quoted with approval by the Oklahoma Supreme Court in the PSO case, *supra* 1280-81.

Many other regulatory commissions have been held lacking jurisdiction to include in the rate base a utility's participation in a free-competition market where the utility dealt with appliances which consumed the utility's energy.[4]

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) a California raisin producer challenged a state statute that authorized "programs for the marketing of agricultural commodities produced in the state, so as to restrict competition

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[4] *Re Intermountain Gas Co., Idaho, Order 11507*, 1974; *Re Southern California Gas Co.*, 35 P.U.R. 3d 300; *Re Montana-Dakota Utilities Co.*, 16 P.U.R. ed 130; *Re Central Arizona L&P Co.*, 6 P.U.R. (NS) 49; *Re Opinion of the Justices*, 23 P.U.R. (NS) 349; *Re Montana-Dakota Utilities Co.*, 78 P.U.R. (NS) 33; *Re Milwaukee G & L Co.*, 44 P.U.R. (NS) 194; *Re New Hampshire Gas & E Co.*, P.U.R. 1931 D, 225; *Commission v. Commonwealth Edison*, P.U.R. 1918 F. 109; *Claggett v. Eastern Shore G & E Co.*, P.U.R. 1920 C. 501; *Re Consolid. G.E.L. & P. Co.*, 14 Ann. Rep. M.P.S.C. 107 (Md); *Texas v. San Antonio P.S.C.*, P.U.R. 1932 B, 336; *Sunset Shingle Co. v. Northwest Electric & Water Works*, 203 P. 978 (Wash.).

among the growers and maintain prices in the distribution of their commodities to packers." The Supreme Court found that the program restricting the marketing of raisins in California "derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command." (at U.S. 250)

The Court held that the Sherman Act did not prohibit states from replacing competition with regulation pursuant to legislative dictation. This decision established the doctrine of state-action immunity. Numerous decisions subsequently have refined the doctrine.

In *Goldfarb v. Virginia State Bar* 421 U.S. 773, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975) the Court held that fee schedules were not compelled by the State Supreme Court *or state legislature* and that a state bar association enforcing them was not immune from antitrust laws even if its conduct was prompted by state action, since the bar association was not executing the mandate of the State[5].

In *Cantor v. Detroit Edison Co., supra* this Court held a Michigan utility which furnished free light bulbs to its electricity users could not claim state-action immunity even though the lamp exchange program was carried on under a tariff approved

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[5] "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Here we need not inquire further into the state-action questions because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities . . . " at U.S. 790.

by the State Commission and could not be abandoned without Commission approval[6].

In *Bates v. State Bar of Arizona, supra* the State Supreme Court's rules prohibiting lawyer advertising were held to confer *"Parker"* immunity because the State Supreme Court wields the state's power over practice of law. Rules were clearly articulated by state policy, and the court closely supervises their enforcement by pointed reexamination.

In *Lafayette v. Louisiana Power & Light Co., supra* two Louisiana cities were alleged to have violated antitrust laws by certain conduct in the operation of electric utility systems. The cities claimed antitrust immunity based upon their status as political subdivisions of the State which would be entitled to state-action immunity. The Court held that conduct of cities was not exempt from application of the antitrust laws "when the State itself has not directed or authorized an anticompetitive practice . . . " (*supra* at U.S. 416)

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[6] "The distribution of electricity in Michigan is pervasively regulated by the Michigan Public Service Commission. A Michigan statute vests the Commission with 'complete power and jurisdiction to regulate all public utilities in the state . . . ' Respondent advises us that the heart of the Commission's function is to regulate the 'furnishing . . . [of] electricity for the production of light, heat or power . . .' "

"The distribution of electric light bulbs in Michigan is unregulated. The statute creating the Commission contains no direct reference to light bulbs. Nor, as far as we have been advised, does any other Michigan statute authorize the regulation of that business." (at U.S. 584)

" . . . Thus, Michigan's regulation of respondent's distribution of electricity poses no necessary conflict with a federal requirement that respondent's activities in competitive markets satisfy antitrust standards." (at U.S. 596)

"we conclude that neither Michigan's approval of the tariff filed by respondent, or the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program." (at U.S. 598)

In *California Liquor Dealers v. Midcal Aluminum, supra* the Court held that enforcement of a State wine-pricing plan should be enjoined, there being no immunity from antitrust laws even though the state legislature had clearly and forthrightly stated a policy to permit resale price maintenance, because there was not sufficient state supervision of the plan, thus the second requirement for "Parker immunity" was not met. The Court established a simple two-part test to determine whether state-action immunity applies:

> " . . . 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Supra* at U.S. 105.

In *324 Liquor Corp., dba Yorkshire Wine & Spirits v. Duffy* 479 U.S. 335, 93 L.Ed.2d 667, 107 S.Ct. 720 (1987) a New York statute which imposed a regime of liquor price maintenance was held invalid, not being within the state-action exemption to antitrust laws. The Court held that the pricing system, though clearly articulated and affirmatively expressed, lacks supervision and therefore failed to meet the second prong of the *Midcal* test.

It is clear that the state policy must be expressed and articulated by the state in its "sovereign capacity" and that state agencies or subdivisions, acting without legislative command, cannot grant immunity.[7]

In denying *Parker* immunity to a city acting under blanket delegation of home-rule authority by the state legislature, this court said: "But plainly the requirement of 'clear articulation

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[7] " . . . Acting alone, however, these agencies could not immunize private anticompetitive conduct." . . . Parker immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature.

and affirmative expression' is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive." *Community Communications Co. v. Boulder*, 455 U.S. 40, 55, 70 L.Ed.2d 810, 102 S.Ct. 835 (1982).

> "In determining whether antitrust law has been displaced, the starting point must be the statute under which the industry in question is regulated . . . (t)he provisions of utility initiated tariff filings do not furnish a predicate for a Parker v. Brown exmption from antitrust claims by competitors injured as a result of compliance with the tariffs." *Essential Comm. v. AT&T*, 610 F.2d 1114, 1117, (CA3d 1979)
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> "This inquiry becomes necessary when an act by a subordinate government agency is at stake for it is well settled that not everything it does is an act of the state as sovereign." *Feldman v. Gardner*, 661 F.2d 1295, 1305 (CA, DC 1981)
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> "Naturally the questions arises—what constitutes an articulation of the state in its sovereign capacity? Certainly enactments of the state in its sovereign capacity . . . On the other hand, state agencies or subdivisions of a State simply by reason of their status as such, apparently do not qualify as the state acting in sovereign." *First Am Title Co. v. S. D. Land Title Assn.*, 714 F.2d 1439, 1451 (C.A. 8d 1983).

Footnote 7 continued from previous page.

"In this case, therefore, the petitioners are entitled to Parker immunity only if collective ratemaking is clearly sanctioned by the legislatures of the four States in which the rate bureaus operate . . ." *Southern Motor Carriers Rate Conf. v. U.S., supra* at L.Ed.2d 49

"Goldfarb therefore made it clear that, for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign." *Lafayette v. Louisiana Power & Light Co., supra* at U.S. 410

The provisions of the state constitution and state statutes relied upon by the Court of Appeals confer no power upon the Corporation Commission to regulate the outdoor-lighting industry (which the Oklahoma Supreme Court has held to be a separate non-utility business beyond the power of the Commission). The defendant can point to no clearly-articulated and affirmatively-expressed policy of the state legislature to replace competition in the lighting market with state regulation. Attempts by the commission to regulate a part of that market by unlawfully approving lighting tariffs of the utility simply because it is regulated in the electric utility business are nothing more than bureaucratic fiat. The unauthorized bogus regulatory acts of the commission do not furnish the required sovereign determination and declaration that competition is not the *summum bonum* in the lighting business.

II.

State Supervision of Program to replace competition.

The "active supervision" requirement stated in *Midcal* and other cases has been applied by this Court in numerous decisions to determine the availability of state-action immunity. In *Bates*, *supra*, this Court held that pointed reexamination by the policy maker was sufficient supervision to confer immunity. In *Midcal* the supervision was held to be insufficient to confer immunity because the state does not monitor market conditions or engage in any pointed reexamination of the program[8].

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[8] "The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As Parker teaches, 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . .' " *supra* at U.S. 106.

Immunity did not exist in *Duffy* because the State scheme of price regulation did not meet part 2 of the *Midcal* test. " . . . New York 'does not monitor market, conditions or engage in any "pointed reexamination" of the program' . . . The State has displaced competition among liquor retailers without substituting an adequate system of regulation. . . . " *supra* at U.S. 345

A claim of *"Parker"* immunity was rejected by this Court in a recent decision: " . . . The active supervision prong of the *Midcal* test requires that state officials *have and exercise power to review particular anticompetitive acts* of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick v. Burget, supra* at L.Ed.2d 92.(emphasis added).

In *Cantor*, this Court in rejecting a state-action immunity claim, considered it significant that "Neither the Michigan Legislature nor the Commission, have ever made any specific investigation of the desirability of a lamp exchange program or of its possible effect upon competition in the lightbulb market." In *Bates* pointed reexamination by the policymaker was significant in the Court's finding of sufficient state supervision. In *Midcal* and *Duffy* the Court found there was not state supervision and, therefore, no immunity when "The State does not monitor market conditions or engage in any pointed reexamination of the program." (*Midcal* at U.S. 106; *Duffy* at U.S. 345).

In *Patrick* the Court held that state officials must "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." (L.Ed.2d at 92) Because this supervisory power

was missing, *Parker* immunity was not available to the defendants.

Neither the Oklahoma Legislature nor the Commission has ever made any investigation of the desirability of displacing competition in the lighting market. Neither the Commission nor any other state agency has ever monitored market conditions or engaged in a pointed reexamination of the particular anticompetitive conduct of the defendant and its possible effect upon the outdoor-lighting market and others, including the plaintiffs, who compete in the same market.

Testimony of the Commission chairman and its general counsel introduced by the respondent in support of its motion for summary judgment conclusively demonstrates the total lack of any consideration of the standards emphasized by the Court in the foregoing decisions[9].

Admittedly, there has been no state supervision over the plaintiffs and others who compete with the defendant in the lighting market. This is true even though those competitors, excluding defendant utility, commanded approximately 70% of the market from 1969 to 1974 and maintained a substantial,

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[9] "Q—Well, do you take into consideration the effect of your regulations on that competition by those electrical contractors? A—No, I don't—I don't know that that would be considered because we don't regulate those electrical contractors . . ." (Commissioner Privett, Def's Memo in Suppt of MSJ, Dkt 17, App. 4, p. 31.)

"Q—Are you aware that independent electrical contractors are in competition with PSO in the outdoor lighting business? A—Yes sir.

Q—And those contractors are unregulated, aren't they? A—That is correct.

Q—And they're not engaged in the public utility business, are they? A—In my opinion, they are not." (Gen. Counsel Swidensky, Def's Memo in Suppt of MSJ, Dkt 17, App. 3 p. 42)

though ever-declining, market share during all times pertinent to this suit. (See plaintiffs' exhibits 22, 24, App. E.) Even if there had been a legislatively expressed policy of the sovereign state to supplant competition in the outdoor-lighting business, it is not possible for the state to supervise particular anticompetitive acts of private parties when supervision ignores major or substantial segments of the market. It is quite apparent that the Commission neither recognizes nor seeks to implement any power given by the Legislature to regulate the outdoor-lighting business, but that the Commission approved tariffs submitted by PSO merely because the utility was otherwise under the Commission's regulatory jurisdiction. If the Commission meant to pointedly reexamine the program, supervise anticompetitive conduct, and monitor market conditions in the lighting business it would have to regulate all competitors, including plaintiffs and others. What the Commission does with other utilities in other parts of the state is irrelevant. PSO is the only utility which has competitors in the lighting business. There are no non-utility competitors such as plaintiffs outside PSO's service area.

III.

Reliance on purported "Regulation" until declared unlawful as a shield from antitrust laws.

The Court of Appeals held that the decision of the Oklahoma Supreme Court which deregulated PSO's lighting business did not deprive the utility of its immunity defense, it being entitled to rely on tariffs approved by the Commission before 1984 even though the Commission was determined to be acting beyond its jurisdiction and power.

This holding directly contravenes the law as laid down by this Court: " . . . a state does not give immunity to those who

violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . " *Parker, supra* at U.S. 351. This same axiom is quoted with approval by the Court in *Midcal supra* at U.S. 106. In *Cantor supra* at U.S. 600 this court stated:

> "Nor can the utility fairly claim that it was led to believe that its conduct was exempt from the federal antitrust laws. A claim of immunity or exemption is in the nature of an affirmative defense to conduct which is otherwise assumed to be unlawful. This Court has never sustained a claim that otherwise unlawful private conduct is exempt from the antitrust laws because it was permitted or required by state law.
>
> "In the Court's most recent consideration of this subject, it described the defendant's claim with pointed precision as 'this so-called state action exemption.' Goldfarb v. Virginia State Bar, 421 U.S. 773, 788, 44 L.Ed2d 572, 95 S.Ct. 2004. The Court then explained that the question whether the anticompetitive activity had been required by the State acting as sovereign was the 'threshold inquiry' in determining whether it was state action of the type the Sherman Act was not meant to proscribed. Certainly that careful use of language could not have been read as a guarantee that compliance with any state requirement would automatically confer federal antitrust immunity."

The Court of Appeals, completely disregarding the law as laid down by this Court, gives complete exoneration to a violator of the antitrust laws for reliance upon an unlawful order of a state agency even though the state legislature had expressed no policy to replace competition nor to authorize the agency even to act in the affected area of commerce. The standard enunciated by the Supreme Court would not afford such forgiveness to a violator acting under valid state compulsion.

Such a rule as that espoused by the Court of Appeals surely cannot be tolerated in the dual federal-state system of laws, for it would allow a simple way for any state agency or political subdivision to render nugatory the supremacy provisions of the United States Constitution. Any state agency or any political subdivision of a state could confer immunity from the antitrust laws by issuing orders and directives and by implementing schemes and plans which are totally unauthorized by any state as sovereign and which are completely beyond the jurisdiction and authority of such state agency or political subdivision.

The vice of the opinion of the Court of Appeals is that it will stand as a precedent for the assumption that state-action immunity exists in cases where the regulatory actions of a state agency have been tolerated only because never focused upon by the courts of the State.

PSO invaded the lighting business on its own initiative. Its executive vice-president testified that it was not required to do so. (testimony King Tr. 1103) He testified that "the (PSO) rate department decides what it wants to charge." (Tr. 1056). The Commission investigated PSO in 1967 and found it was furnishing service and charging rates without Commission approval (Tr 854-861). PSO did not have a tariff for commercial and industrial outdoor lighting approved by a Commission order (as required by Commission rules) before 1975. The order gave blanket approval of numerous tariffs and made no mention of lighting. PSO admittedly leased such lights as early as 1923 (Tr 1064). Defendant's exhibit 4 contains 5 outdoor-lighting tariffs that were not even filed with the Commission. Others, though filed, were not approved by commission orders. No order approving an outdoor-lighting tariff before 1975 has been produced. (See DX 5). PSO leased 400w lights long before

it claims to have had an approved tariff (Tr 684, 189, 193). The first Commission order that mentions outdoor lighting is dated May 7, 1980. That order was reversed by the State Supreme Court in the PSO case, *supra*.

PSO cannot fairly claim that it justifiably believed its conduct in the lighting business was immune from the antitrust laws. The utility entered the lighting busines voluntarily without compulsion or direction by the State. It did not comply with the law and Commission rules so as to utilize Commission-approved tariffs at all times when it leased lights in the unregulated competitive market. This Court's decision in *Cantor* in 1976 gave clear and strong warning to utilities that they must observe antitrust laws when they enter competitive markets outside the scope of their regulated monopoly. Respondent cannot be heard to contend that it was led to believe that its conduct was exempt from the antitrust laws.

CONCLUSION

The Court of Appeals disregarded the numerous decisions of the U. S. Supreme Court in ruling that the Respondent is immune. PSO's conduct in the competitive lighting market fails to satisfy either part of the *Midcal* test. (1) There is no clearly articulated and affirmatively expressed policy of the State Legislature to displace competition. (2) There is no active State supervision. A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, 10th Circuit.

Very respectfully submitted,

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APPENDIX A

LEASE LIGHTS, INC.; Jack R. Seay, d/b/a Seay Electric Company; Knight Lights Company, Inc.; and Protective Lighting, Inc.

Plaintiffs-Appellant

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation,

Defendant-Appellant

Oklahoma Corporation Commission, Amicus Curiae.

No. 86-1797

United States Court of Appeals, Tenth Circuit.

June 27, 1988

The Public Service Company of Oklahoma (PSO) appeals from the jury verdict that it monopolized a sector of the leased outdoor lighting market in Tulsa, Oklahoma. PSO argues its conduct was controlled and supervised by the Oklahoma Corporation Commission (the Commission) until 1985 and may not be the subject of an antitrust action under the state action doctrine. PSO further urges that plaintiffs fail to prove sufficient non-immune conduct to support the claim of attempted monopolization. We hold that the state action doctrine protects those actions by PSO which were actively supervised by the Commission. In addition, we believe plaintiffs have failed to present adequate evidence of non-immune behavior by PSO to show an attempt to illegally monopolize the market for leased outdoor lighting in Tulsa. We therefore reverse the judgment of the district court.

I.

PSO is a public utility engaged in the generation, transmission, and delivery of electricity in parts of eastern and southwestern Oklahoma.[1] PSO also sells and leases 175 and 400 watt outdoor lights in Tulsa, Oklahoma. The Commission, a state agency, supervises the rates charged by PSO for leasing outdoor lights to the public and for providing electricity to competing light services. In 1975, the Commission ordered PSO both to reduce the rates charged to the public for its outdoor lighting service and to restructure its rate system for providing electricity by replacing the flat annual fee with an outdoor metered rate. As a result, PSO reduced its leasing rates in Tulsa by about four percent (from $4.00 to $3.85 for 175 watt lights), while substantially increasing the rates charged to contractors for electricity used in their competing light services.

Four electrical contractors brought this action in 1977, alleging that this order was the economic equivalent of an "atomic bomb." They claimed PSO sought to drive them out of business in order to monopolize the outdoor lighting market in the Tulsa area. PSO unsuccessfully moved for summary judgment, asserting its challenged conduct was immune from antitrust attack under the state action doctrine. The district court held that the state action immunity doctrine was still developing and no consistent test had emerged. In 1981, the action proceeded to a two-week jury trial during which the court directed a verdict against the plaintiffs for failing to satisfy the jurisdictional requirement of a Sherman Act violation by showing PSO's activities had a substantial impact on interstate commerce. This court reversed, holding that plaintiffs had made a

[1] Electric power is also provided in Oklahoma by three other investor-owned utilities and by 31 rural electrical cooperatives.

prima facie showing of a sufficient nexus between PSO's actions and interstate commerce. *See Lease Lights v. Public Serv. Co. of Okla.*, 701 F.2d 794 (10th Cir.1983). In a second trial in 1984, the jury awarded plaintiffs trebled damages exceeding $2 million. The court added over $500,000 in attorney fees and costs. PSO appeals from this judgment.

II.

A.

PSO's main argument is that its rate changes should be immune from antitrust attack. As first conceived by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the state action doctrine allowed state legislatures to formally command that certain areas of commerce be exempt from the provisions of the Sherman Act. The Court subsequently developed the requirement that state legislatures compel the immune behavior. In *Goldfarb v. Virginia State Bar Ass'n*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), for example, the Court struck down a minimum fee schedule enforced by the state bar, holding that there existed neither a state law nor a state supreme court decision requiring the establishment of a rigid price floor in the fees attorneys could charge their clients. Similarly, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Court decided that state regulation on Detroit Edison's distribution of electricity did not confer state action immunity on its anticompetitive actions in the market for the sale of light bulbs. State regulation alone, according to the Court, was insufficient to show that a party's anticompetitive conduct is being commanded by the state government. As in *Goldfarb*, the Court in *Cantor* required a state to compel, rather than merely prompt or allow, anticompetitive conduct for state action immunity to be conferred.

Plaintiffs now urge us to adhere to the compulsion requirement set forth in these decisions. They ignore, however, that the Supreme Court has explicitly softened the previously stringent requirements for state action immunity. In *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), the United States challenged a joint ratemaking procedure used by three motor carrier rate bureaus, arguing that the procedure could not be immune under the state action doctrine because it was not compelled by the four states in which the bureaus operated. The Court refused to adhere to the compulsion requirement. While compulsion by the state is the best evidence of a state policy to displace competition, according to the Court, immunity is justified if a state merely *permits* the conduct to occur. This test is satisfied by showing 1) the challenged behavior is sanctioned by a clearly articulated and affirmatively expressed state policy, and 2) the state actively supervises the private anticompetitive conduct at issue. 471 U.S. at 57, 105 S.Ct. at 1726 (citing *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980)). The first element of the test does not require legislation explicitly authorizing the challenged conduct, but only an indication by the state that it intends to displace competition with regulation in the particular area of commerce. *Id.* at 64. 105 S.Ct. at 1730.

The Court held the rate bureaus met these requirements. Both parties agreed that the regulatory agencies in the four states actively supervised the collective ratemaking activities. Furthermore, three of the four states had statutes permitting collective ratemaking by common carriers. The fourth state, Mississippi, gave the regulatory agency authority to regulate common carriers by granting it the power to prescribe "just and reasonable rates" for the intrastate transportation of general

commodities. This language, the Court states, expressed the legislature's intent that intrastate trucking rates be determined by a regulatory agency, rather than by the market. Therefore, plaintiffs' collective ratemaking in each of the four states was protected by state action immunity.

The test employed in *Southern Motor Carriers* to replace the compulsion requirement has received consistent recognition by the Court as the proper standard to determine the applicability of state action immunity.[2] Indeed, on every occasion that the Court has considered state action immunity during the past three years, it has invoked the *Southern Motor Carriers* test rather than the compulsion test. *See, e.g., 324 Liquor Corp. v. Duffy,* 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987) (New York's liquor pricing system does not fall within state action exemption to antitrust laws because the statute, even though "clearly articulated and affirmatively expressed as state policy," does not provide for active supervision by the state). Recently, for example, the Court held that the state action doctrine did not protect Oregon physicians from antitrust liability for their activities on hospital peer-review committees because state officials did not have the power to review the findings of these committees, and therefore the "active supervision" prong of the *Southern Motor Carriers* test was not satisfied. *See Patrick v. Burget,*—U.S.—, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

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[2] While the Court first articulated the test in the *Midcal Aluminum* decision, it also approved the compulsion requirement in that case. Needless to say, after *Midcal Aluminum* the federal courts were in complete confusion regarding which test to adopt. In *Southern Motor Carriers,* the Court for the first time clearly rejected the compulsion requirement. *See* Comment, *Private Parties and State Action Immunity to the Sherman Anti-Trust Act After Southern Motor Carriers Rate Conference,* 24 Houston L.Rev. 311, 333 (1987).

We have dwelled on *Southern Motor Carriers* and its progeny because these decisions are dispositive of the instant case. First, we believe there exists a clearly articulated state policy to regulate the market for leased outdoor lights. The Oklahoma Constitution gives the Commission the power to regulate public utilities, which it defines as "all gas, electric, heat, *light,* and power companies . . . ." Okla. Const. art. IX, § 34 (emphasis added). Pursuant to this authority, the legislature has given the Commission general supervision over all public utilities that supply "the production, transmission, delivery, or furnishing of heat *or light* with gas [and the] . . . electric current for *light,* heat or power." *See* Okla.Stat.tit. 17, § 151 (1981) (emphasis added).

Within this domain, the Commission has the power to prescribe "rules, requirements and regulations, affecting [the utilities'] services, operation, and the management and conduct of their business." Okla. Stat. tit. 17, § 152. The Commission also establishes and enforces rates "as may be reasonable and just." Okla. Const. art. IX, § 18. The constitution states that the authority of the Commission to prescribe these rates is paramount; rates which are inconsistent with the Commission's rates "shall be unlawful and void." *Id.* To carry out this mandate, the Commission may exercise "full visitorial and inquisitorial power to examine . . . public utilities . . . ." Okla.Stat. tit. 17, § 152. Furthermore, the Commission must periodically conduct detailed rate investigations and continually oversee public utilities' compliance with rate schedules which include fuel adjustment clauses. Okla.Stat. tit. 17, §§ 252, 263. We hold that these constitutional and statutory provisions indicate a clear intent by the state to supplant the market for leased outdoor lighting with active regulation by the Commission.

We also believe the Commission has used this grant of authority to closely supervise the outdoor lighting services provided by public utilities, including PSO. The Commission has regulated the outdoor lighting market in Oklahoma for twenty years. It currently imposes a thorough set of guidelines upon the lighting services of thirty-three public utilities operating within Oklahoma. Moreover, the Commission until 1985 closely regulated the rates charged by PSO for its outdoor lighting services. From 1977 to 1985, PSO submitted monthly reports to the Commission of its compliance with the fuel adjustment clause in its outdoor lighting rates. When PSO applied to reduce its Tulsa lighting charge from $4.00 to $3.95 a month for a 175 watt light (while raising the cost of its service in rural areas), the Commission conducted three days of public hearings involving extensive testimony and over 100 exhibits. After considering the evidence, the Commission rejected PSO's request and chose instead to reduce PSO's rate to $3.85. Thus, the lower rate charged by PSO for its outdoor lighting service in Tulsa, which plaintiffs claim destroyed their business, was compelled by an independent decision of the Commission that PSO could not disobey.

B.

Plaintiffs emphasize that the Oklahoma Supreme Court overturned the Commission's outdoor lighting rates in December 1983, finding that PSO's lighting business "is not used or useful to the ratepayers as a whole, and thus its investment may not be included in its general rate base." *Public Serv. Co. of Okla. v. Oklahoma Corp. Comm'n*, 688 P.2d 1274, 1281 (Okla.1983) (*PSO*).[3] We hold that this decision did not alter PSO's responsibility to comply with rates mandated by the

[3] As a result of this decision, the Commission decontrolled the rates for PSO's outdoor lighting service in April 1985.

Commission before 1984. The constitutional invalidity of the attempted state regulation is not an appropriate basis for disregarding state action immunity. *E.g., Llewellyn v. Crothers,* 765 F.2d 769, 774 (9th Cir.1985). Rather, there should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.4b, at 132 (Supp.1987). To rule otherwise would require regulated industries to seek judicial review of every order of a regulatory agency to ensure that compliance does not later subject them to antitrust liability.

In this case, neither the Commission nor PSO had any reason to anticipate that outdoor lighting rates could not be included in PSO's rate base. Until the 1984 decision, the Oklahoma Supreme Court had never overturned a decision by the Commission involving the outdoor lighting of a regulated utility. Indeed, the court affirmed the 1975 "atomic bomb" order challenged in the instant case in *Chickasha Cotton Oil Co. v. Oklahoma Corp. Comm'n,* 562 P.2d 507 (Okla.), *cert. denied,* 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 88 (1977). The court also stated one year before *PSO,* "[t]he duty of the Commission to supervise, regulate and control the charges and rates of public utilities is constitutionally mandated." *Cartwright v. Southwestern Bell Tel. Co.,* 662 P.2d 675, 679 (Okla.1983).[4]

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[4] Furthermore, the 1984 decision may reasonably be interpreted as only requiring evidence that outdoor lighting is useful to the ratepayers, rather than as a limit on the Commission's jurisdiction to regulate the outdoor lighting market. Based on this interpretation, the Commission reconfirmed in December 1985 that the outdoor lighting provided by PSO's neighboring utility, Oklahoma Gas and Electric Company, should continue to be regulated. The Commission distinguished the *PSO* case on the ground that Oklahoma Gas and Electric's outdoor security lighting earned a "higher

For these reasons, we conclude that PSO's rate changes meet the test for state action immunity set forth in *Southern Motor Carriers.* Indeed, PSO's case for immunity is even stronger than the arguments successfully espoused in *Southern Motor Carriers,* since in that case, regulatory agencies merely allowed the challenged collective ratemaking by trucking companies. Individual common carriers remained free to submit invidiual rate proposals to the Public Service Commissions. 471 U.S. at 52, 105 S.Ct. at 1724. In the instant case, however, the Commission compelled the challenged conduct by rejecting PSO's requested rates and establishing its own price after extensive, formal hearings were held. As mentioned, the Court held in *Southern Motor Carriers* that compulsion is the best evidence of a state policy to displace competition. 471 U.S. at 62, 105 S.Ct. at 1729. Therefore, we hold that PSO's actions pursuant to the Commission's rate orders are immune from antitrust attack under the state action doctrine.[5]

Footnote 4 continued from previous page.

than system average rate of return" and was not subsidized by the other service classes. *See In the Matter of the Application of Oklahoma Gas and Electric Company,* OCC Cause No. 29450, Order No. 290658, p.10 (Dec. 20, 1985). We note that the interpretation of the public utility laws by the expert agency charged with enforcement of these laws should be given persuasive weight. *E.g., Gambrel v. Kentucky Bd. of Dentistry,* 689 F.2d 612 (6th Cir.1982), *cert. denied,* 459 U.S. 1208, 103 S.Ct. 1198, 75 L.Ed.2d 441 (1983).

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[5] PSO also believes it is insulated from liability by the Noerr-Pennington doctrine, which precludes application of the Sherman Act to an entity's efforts to obtain favorable treatment from the government, even if its goals are anticompetitive. Given our holding on PSO's state action immunity claim, we need not address this issue.

III.

The remaining issue is whether plaintiffs proved sufficient non-immune conduct to support the verdict. To prove attempted monopolization, plaintiffs must show: 1) a relevant market in which the alleged attempt occurred; 2) a dangerous probability of success in monopolizing the relevant market; 3) a specific intent to monopolize; and 4) conduct in furtherance of such an attempt. *Shoppin' Bag of Pueblo v. Dillon Cos.*, 783 F.2d 159, 161 (10th Cir.1986). Once immunity is recognized, PSO argues, it should be shielded from all complaints regarding the rate changes resulting from the 1975 order and from any other conduct which was mandated by the Commission. PSO believes that once the immune conduct is extirpated from plaintiffs' prima facie case, nothing remains of plaintiffs' contentions from which a reasonable jury could find predatory conduct satisfying the latter three elements of attempted monopolization.

We agree. Plaintiffs complain of a series of rate changes by PSO for its outdoor lighting service from 1973 to 1983, including the 1975 "atomic bomb" rate order. Yet each of these rate orders are immune under the state action doctrine because the Commission consistently established and supervised the rates charged by PSO during this period.

Several of plaintiffs' remaining allegations also concern conduct that is immune under the state action doctrine. For example, plaintiffs argue that PSO has an unfair advantage because, unlike private contractors, it is authorized by state and local authorities to install lighting without a state or municipal license. However, PSO did not cause these regulations to be adopted and is immune from attack based on the licensing requirements of state and local law, since these regulations are clearly articulated and actively supervised by the government.

For the same reason, plaintiffs' complaint that PSO refused to allow them to attach their lights to PSO's poles without a permit is untenable. Franchise agreements require plaintiffs to have a municipal permit before using PSO's poles; they expressly declare that PSO is "authorized to allow others *having a permitted right* granted by the City of Tulsa to attach facilities to its poles and structures." (Emphasis added.) Again, there is no evidence that these regulations are a sham or that city franchise agreements should not be immune from attack under the antitrust laws. *See Rural Elec. Co. v. Cheyenne Light, Fuel & Power Co.*, 762 F.2d 847 (10th Cir.1985) (requirements in city franchise agreement are immune from challenge under the state action doctrine).

Plaintiffs' final claim is that PSO unreasonably delayed hooking up their lights. While this alleged behavior is not immune under the state action doctrine, we believe plaintiffs have failed to show the delay resulted from a policy of discrimination. The only testimony on this issue was from a customer of plaintiffs who attributed the delay in the hookup of his light to the need to install an intermediate pole to bridge the distance between the existing electrical service and his light. Furthermore, PSO only had three work crews to serve 71,000 customers, and hooking up new commercial installations was a lower priority than restoring interrupted service or servicing new residential customers. We believe, therefore, there is no evidence that hookups for PSO's outdoor lighting customers received priority over hookups for other outdoor lighting installations. We hold that plaintiffs have failed to show either a specific intent to monopolize or nonimmune conduct in fur-

therance of the attempted monopolization.[6] Accordingly, the district court's judgment is REVERSED.

[6] Because of our holding, we need not address whether plaintiffs satisfied the first two elements of attempted monopolization. We note, though, that to satisfy the second element, plaintiffs must show there existed a dangerous probability of PSO succeeding in monopolizing the relevant market by proving it had the ability to control prices and exclude competition. *E.g., Shoppin' Bag of Pueblo,* 783 F.2d at 164. This would have been a very difficult task, given the fact that the Commission dictated to *PSO* both the price it could charge for leasing outdoor lights and the electricity rates it could levy on competing contractors. *Cf. Bright v. Moss Ambulance Serv.,* 824 F.2d 819, 824 (10th Cir.1987) (activity which is protected by state action immunity may not be the basis for allegations of improper market power).

No. 86-1797

LEASELIGHTS, INC.; JACK R. SEAY, d/b/a Seay Electric Company; KNIGHT LIGHTS COMPANY, INC.; and PROTECTIVE LIGHTING, INC.

Plaintiffs-Appellees

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA, a corporation

Defendant-Appellant

OKLAHOMA CORPORATION COMMISSION

Amicus Curie

August 16, 1988

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Judge Stephanie K. Seymour did not participate in consideration of the petition.

S/S Robert L. Hoecker

ROBERT L. HOECKER, Clerk

APPENDIX B

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Code, Title 15

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousands dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

United States Code, Title 28 § 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same fall faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Constitution of the State of Oklahoma, Art. 9, § 18. Powers and duties—Notice before taking action—Process for witnesses—Authority of Legislature—Municipal powers

The Commission shall have the power and authority and be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this State, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend. All rates, charges, classifications, rules and regulations adopted, or acted upon, by any such company, inconsistent

with those prescribed by the Commission, within the scope of its authority, shall be unlawful and void. The Commission shall also have the right, at all times, to inspect the books and papers of all transportation and transmission companies doing business in this State, and to require from such companies, from time to time, special reports and statements, under oath, concerning their business; it shall keep itself fully informed of the physical condition of all the railroads of the State, as to the manner in which they are operated, with reference to the security and accommodation of the public, and shall, from time to time, make and enforce such requirements, rules, and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency of transportation, transmission, or otherwise, in connection with the public duties of such company. Before the Commission shall prescribe or fix any rate, charge or classification of traffic, and before it shall make any order, rule, regulation, or requirement directed against any one or more companies by name, the company or companies to be affected by such rate, charge, classification, order, rule, regulation, or requirement, shall first be given, by the Commission, at least ten days' notice of the time and place, when and where the contemplated action in the premises will be considered and disposed of, and shall be afforded a reasonable opportunity to introduce evidence and to be heard thereon, to the end that justice may be done, and shall have process to enforce the attendance of witnesses; and before said Commission shall make or prescribe any general order, rule, regulation, or requirement, not directed against any specific company or companies by name, the contemplated general order, rule, regulation, or re-

quirement shall first be published in substance, not less than once a week, for four consecutive weeks, in one or more of the newspapers of general circulation published in the county in which the Capitol of this State may be located, together with the notice of the time and place, when and where the Commission will hear any objections which may be urged by any person interested, against the proposed order, rule, regulation, or requirement; and every such general order, rule, regulation, or requirement, made by the Commission, shall be published at length, for the time and in the manner above specified, before it shall go into effect, and shall also, so long as it remains in force, be published in each subsequent annual report of the Commission. The authority of the Commission (subject to review on appeal as hereinafter provided) to prescribe rates, charges, and classifications of traffic, for transportation and transmission companies, shall, subject to regulation by law, be paramount; but its authority to prescribe any other rules, regulations or requirements for corporations or other persons shall be subject to the superior authority of the Legislature to legislate thereon by general laws: Provided, However, That nothing in this section shall impair the rights which have heretofore been, or may hereafter be, conferred by law upon the authorities of any city, town or country to prescribe rules, regulations, or rates of charges to be observed by any public service corporation in connection with any services performed by it under a municipal or county franchise granted by such city, town, or county, so far as such services may be wholly within the limits of the city, town, or county granting the franchise. Upon the request of the parties interested, it shall be the duty of the Commission, as far as possible, to effect, by meditation, the adjustment of claims, and the settlement of controversies, between transportation or transmission companies and their patrons or employees.

Constitution of the State of Oklahoma, Art. 9, § 34. Definitions—Avoidance of conflicts with U. S. Constitution

As used in this Article, the term "transportation company" shall include any company, corporation, trustee, receiver or any other person owning, leasing or operating for hire a railroad, street railway, canal, steamboat line, and also any freight car company, car corporation, or company, trustee or persons in any way engaged in such business as a common carrier over a route acquired in whole or in part under the right of eminent domain, or under any grant from the Government of the United States; the term "rate" shall be construed to mean rate of charge for any service rendered, or to be rendered; the terms "rate," "charge" and "regulation" shall include joint rates, joint charges and joint regulations, respectively; the term "transmission company" shall include any company, receiver or other person owning, leasing or operating for hire any telegraph or telephone line; the term "freight" shall be construed to mean any property transported or received for transportation by any transportation company. The term "public service corporation" shall include all transportation and transmission companies, all gas, electric, heat, light and power companies, and all persons, firms, corporations, receivers or trustees engaged in said businesses, and all persons, firms, corporations, receivers or trustees authorized to exercise the right of eminent domain or having a franchise to use or occupy any right of way, street, alley or public highway, whether along, over or under the same, in a manner not permitted to the general public, and all persons, firms, corporations, receivers and trustees engaged in any business which is a public utility or a public service corporation, at the present time or which may hereafter be declared to be a public utility or a public service corporation. The term "person" as used in this Article shall in-

clude individuals, partnerships, and corporations in the singular as well as plural number; the term "bond" shall mean all certificates or written evidence of indebtedness issued by any corporation and secured by mortgage or trust deed. The term "frank" shall mean any writing or token issued by or under authority of a transmission company, entitling the holder to any service from such company free of charge.

The provisions of this Article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case.

Amended by Laws 1941, p. 546, § 5.

Oklahoma Statutes, Title 17, § 151. Public utility defined —Exemption of nonprofit water and sewer corporations— Washington County—Authority of certain beneficiaries to condemn property

The term "public utility" as used in Sections 151 through 155 of this title, shall be taken to mean and include every corporation, association, company, individuals, their trustees, lessees, or receivers, successors or assigns, except as hereinafter provided, and except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public.

(a) For the conveyance of gas by pipeline.

(b) For the production, transmission, delivery or furnishing of heat or light with gas.

(c) For the production, transmission, delivery or furnishing electric current for light, heat or power.

(d) For the transportation, delivery or furnishing of water for domestic purposes or for power. Provided further that a corporation organized and existing not for profit pursuant to Title 18 of the Oklahoma Statutes, §§ 851-863, but for the purpose of developing and providing rural water supply and sewage disposal facilities to serve rural residents shall not be declared a public utility under this act.[1] and shall be exempt in any and all respects from the jurisdiction and control of the Corporation Commission of this state.

The term "Commission" shall be taken to mean Corporation Commission of Oklahoma.

* * *

Laws 1913, c. 93, p. 150, § 1. Laws 1929, c. 353, p. 487, § 1; Laws 1971, c. 26, § 1; Laws 1971, c. 322, § 1, eff. June 24, 1971.

Oklahoma Statutes, Title 17 § 152. Commission's jurisdiction over public utilities

The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business thereof, and the method in which same is conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus,

[1] Section 151 et seq. of this title.

and other property owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act,[2] and with the Constitution and laws of this state, and with the orders of the Commission.

Laws 1913, c. 93, p. 150, § 2.

[2] Section 151 et. seq. of this title.

APPENDIX C

PUBLIC SERVICE COMPANY OF OKLAHOMA
Appellant

v.

OKLAHOMA CORPORATION COMMISSION
Appellee

v.

The COALIATION FOR FAIR UTILITY RATES, INC., and Neighbor for Neighbor, Inc.
Cross-Appellants

v.

NATIONAL ELECTRIC CONTRACTORS ASSOCIATION, INC., Eastern Oklahoma Chapter, and Lease Lights, Inc., et al.
Counter-Appellants

Nos. 55320, 55346 and 55354.

Supreme Court of Oklahoma

December 27, 1983.

As Corrected Oct. 1, 1984.

Rehearings Denied Oct. 2, 1984.

DOOLIN, Justice:

Public Service Company (PSO), a Tulsa-based public utility, applied to the Corporation Commission for a 129 million rate increase. Following hearings at which several parties intervened, the Commission issued order No. 168923 from which PSO and the intervenors appeal.

* * *

VI

[1280] We are next asked to address Commission's inclusion into the rate base of PSO's investment in sodium and mercury vapor outdoor lighting. Evidence indicates PSO is in the business of furnishing illumination to commercial and industrial customers for a flat monthly fee. It provides and installs the poles, lamps, wires, controls, electricity and maintenance. Cross-appellants Lease Lights and others provide the identical service, and they appeal from the decision by Commission to include PSO's investment in said lights in PSO's rate base, thus guaranteeing it a rate of return on the business. The issue is not whether PSO has the right to carry on such a business; that is conceded by the opponents. The issue is whether PSO's investments in that business may be included in its rate base for all the ratepayers to bear. We answer in the negative.

The argument revolves substantially around *jurisdiction* of Commission to even deal with PSO's investment in the lighting business.

Lease Lights, a direct competitor of PSO's lighting business, says Commission should disallow expenditures for ratemaking purposes "unless the utility establishes such expenditure is demonstrated to be beneficial to *all* consumers." *State v. Oklahoma Gas & Electric,* 536 P.2d 887 (Okl.1975). (Emphasis added). It said PSO offered no evidence to justify including the investment in the rate base, which was its legal burden of proof.

National Electrical Contractors Association, Inc. (NECA), a counter-appellant, contends PSO is authorized to include in its rate base only equipment and plants used for the production, transmisssion, delivery and furnishing of electric power, citing 17 O.S. 1981, § 151, the statutory definition of a "public

utility." It argues that a public utility's rate base should include only those items which are used and useful to the utility's *public* service, not its *private* business. Its brief quotes from part of the dissent filed by Commissioner Bill Dawson:

> "It seems to this Commissioner that it is only unlawful but inequitable and unjust for a public utility to impose upon the general ratepayers the cost of outdoor-lighting which is utilized by a ratively (sic) small percentage of the customers (mostly commercial customers) who want the service, when a vast majority of the ratepayers have no desire for the service. The same outdoor-lighting service, at lease for commercial and industrial users, appears to be available through private contractors on a competitive basis without the imposition of unjust cost upon the general ratepayers.
>
> If a public utility can provide appliances to furnish illumination or lighting and include the investment and operation of such installations in its rate base, it could provide all appliances merely because they are operated by electricity. It could provide and include in its rate base all heating and air-conditioning systems, both residential and commercial. It could install, provide and include in its rate base all building elevators and all manner of electric motors and electrically-powered equipment. The natural result of such reasoning would be that a water utility could install and include in its rate base a bathtub in every residence, merely because it is supplied by water which the utility is authorized to furnish under its rate structure."

Finally NECA argues, as do the other intervenors, that the decision by the Commission to include outlighting expenses in PSO's rate base is not supported by substantial evidence. PSO answers that intervenors did not question the inclusion during the hearing, and only brought it to Commission's attention via

brief after the close of the hearing. It argues that absent notice it should not be required to account for every item to be included in the rate base. See *Central Maine Power Co. v. Maine Public Utilities Commission,* 405 A.2d 153 (Me.1979) which involved land held for future use and investment in joint corporate projects accounts. In fact, PSO admits "there is thus almost no evidentiary record on the subject" because it was not challenged before the Commission.

PSO argues that its area lighting service is as much a "public service" as its conservation and research programs and expenses for its general offices and home energy audits. It fails to note, however, that all the later categories do in fact serve the public as a whole, while its area lighting program serves only a very small proportion of the public. In other words, PSO would have *all* its ratepayers pay for a service utilitzed by a very few ratepayers.

Parties note Commission may exclude unnecessary items of cost. As example, the Commission may exclude certain promotional expenses if they are excessive, unwarranted, unreasonable, or incurred in bad faith." See *State v. Oklahoma Gas & Electric Co., supra.* Both parties note the case of *Virginia Electric Power Co. v. State Corporation Commission,* 219 Va. 894, 252 S.E.2d 333 (1979), in which the Commission excluded investment in outdoor area lighting from the company's rate base as "not devoted to the use and accommodation of the public," and such decision was upheld by the Virginia Court. The Virginia Court said the Commission had the authority to determine the public duties of the Company.

We hold that a business such as area outdoor lighting is a separate venture of PSO, is not used or useful to the ratepayers as a whole, and thus its investment may not be included in its

general rate base. It is similar in nature to the selling of appliances (which are improper under 18 O.S. 1971, § 1.27). See *State v. Oklahoma Gas & Electric*, supra.

* * *

AFFIRMED IN PART, REVERSED IN PART, CAUSE REMANDED TO ENTER ORDER CONSISTENT WITH THE VIEWS EXPRESSED HEREIN, INCLUDING CONSIDERATION OF SUBSTANCE ERROR AS TO CALCULATION, IF ANY, AS DISCUSSED IN PART IV HEREOF.

SIMMS, V.C.J., HARGRAVE, J., and ROBINSON, S.J., concur.

BARNES, C.J., and LAVENDER, J., concur in Parts I, II, III, IV, V and VII and dissent from Part VI.

HODGES, J., concurs in all parts except dissents to Part V.

OPALA, J., concurring in Parts I, III, IV, VII; dissents from Parts II, V, VI.

APPENDIX D

No. 55,320

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA
Appellant

v.

THE STATE OF OKLAHOMA
Appellee

v.

The COALIATION FOR FAIR UTILITY RATES, INC., AND NEIGHBOR FOR NEIGHBOR, INC.
Cross-Appellants

v.

NATIONAL ELECTRIC CONTRACTORS ASSOCIATION, INC., EASTERN OKLAHOMA CHAPTER, AND LEASE LIGHTS, INC.
Counter-Appellants

REPLY BRIEF

Appeal From
The Oklahoma Corporation Commission

---

* * *

PSO and the Commission argue that Article IX, Section 34, which defines "public service corporations" to include "light" companies, places outdoor lighting within the Commission's rate making power. This argument admits the error of their previous contentions that 17 O.S. 1971, § 151, because it is definitional, does not restrict PSO's rate base.

Article IX does not address the Commission's jurisdiction over "public utilities", such as PSO. The Constitution vests Commission jurisdiction only as to transmission and transportation companies. *Shawnee Gas & Electric Co. v. Corporation Commission of Oklahoma,* 35 Okla. 454, 130 P. 127, 129 (1913). The framers of the Constitution left the matter of "public utilities" to the Legislature, which in turn enacted 17 O.S. 1971, § 151, et seq. These sections—not the Constitution —govern the Commission's power to set PSO's rates.

PSO's rate base is restricted by 17 O.S. 1971, § 151, then, or by nothing at all. If by nothing, PSO is free to engage in absolutely any activity, and be guaranteed a fair rate of return thereon. Indeed, if Section 151 does not restrict PSO's rate base, then rate base items need not be even useful to the public, because § 151 is the only provision governing public utilities which contains such a requirement. The only possible conclusion is that 17 O.S. 1971, § 151 does restrict PSO's rate base, i.e., that PSO's rate base may include only such activities as are used to generate or distribute electric current.

RESPECTFULLY SUBMITTED,
NICHOLS & WOLFE, INC.

S/S Brian Huckabee

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FILED
SUPREME COURT
STATE OF OKLAHOMA
DEC 16 1981
Ross I. Lillard, Jr.
CLERK

NO. 55,320

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA
Appellant

v.

THE STATE OF OKLAHOMA
Appellee

v.

The COALIATION FOR FAIR UTILITY RATES, INC., and Neighbor for Neighbor, Inc.
Cross-Appellants

v.

NATIONAL ELECTRIC CONTRACTORS ASSOCIATION, INC., EASTERN OKLAHOMA CHAPTER, and LEASE LIGHTS, INC.
Counter-Appellants

ANSWER BRIEF OF APPELLEE OKLAHOMA CORPORATION COMMISSION

* * *

Other provisions in the Constitution and statutes of Oklahoma indicate that electric utilities are not solely restricted to the furnishing of electric current. In fact, electric utilities are referred to at several points as "light and power companies." Perhaps the most important of these is Article IX, § 34, which provides in part:

> The term "public service corporation" shall include all transportation and transmission companies, all gas, electric, heat, light and power companies, and all persons, firms, corporation, receivers or trustees engaged in said business . . .

Article IX, § 18 of the Oklahoma Constitution, places public service corporations under the Commission's jurisdiction. Thus the Commission has jurisdiction over PSO both as a company which furnishes electric current, and as a company which furnishes light.

Respectfully submitted,

S/S Eddie M. Pope

EDDIE M. POPE
Appellate Counsel
Oklahoma Corporation Commission

NO. 55,320

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA
Appellant

v.

THE STATE OF OKLAHOMA
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v.

THE COALIATION FOR FAIR UTILITY RATES, INC., and NEIGHBOR FOR NEIGHBOR, INC.
Cross-Appellants

v.

NATIONAL ELECTRIC CONTRACTORS ASSOCIATION, INC., EASTERN OKLAHOMA CHAPTER, and LEASE LIGHTS, INC.
Counter-Appellants

APPELLANT'S REPLY BRIEF

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* * *

As such, *all* of its activities related to that business are subject to Commission jurisdiction and supervision. This basic premise is clearly set forth in Article IX, § of the Oklahoma Constitution, which reads, in pertinent part:

> "The Commission shall have the power and authority and be charged with the duty of supervising, regula-

ting and controlling all transportation and transmission companies doing business in this State, *in all matters relating to the performance of their public duties and their charges therefor*, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end, the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, *and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just*, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter or amend." (Emphasis added.)

* * *

Respectfully submitted,

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FILED
SUPREME COURT
STATE OF OKLAHOMA
FEB 6 1984
Ross N. Lillard, Jr.
CLERK

No. 55,320

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

PUBLIC SERVICE COMPANY OF OKLAHOMA
Appellant

v.

THE STATE OF OKLAHOMA
Appellee

v.

THE COALIATION FOR FAIR UTILITY RATES, INC., and NEIGHBOR FOR NEIGHBOR, INC.
Cross-Appellants

v.

NATIONAL ELECTRIC CONTRACTORS ASSOCIATION, INC., EASTERN OKLAHOMA CHAPTER, and LEASE LIGHTS, INC.
Counter-Appellants

RESPONSE TO BRIEFS FOR REHEARING

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* * *

The third concern of the Commission is the factual underpinning of the Court's order. The Commission in its initial brief viewed this question as one of law regarding Commission jurisdiction. Having read the decision of the Court and the submissions of other parties, the Commission believs it would be useful to the Court for the Commission to have an opportunity to build a better factual basis as a foundation for a Commission and, on possible review, Court determination as to the public interest.

* * *

CONCLUSION

The Commission respectfully recommends that this Court deny PSO's Petition for Rehearing with regard to Northeastner No. 3, but grant rehearing and remand the case on the outdoor lighting issue.

Respectfully submitted,

S/S J. Bailey
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S/S Lindil C. Fowler, Jr.
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FILED
SUPREME COURT
STATE OF OKLAHOMA
OCT 2 1984
JAMES W. PATTERSON
CLERK

IN THE
SUPREME COURT OF THE STATE OF OKLAHOMA

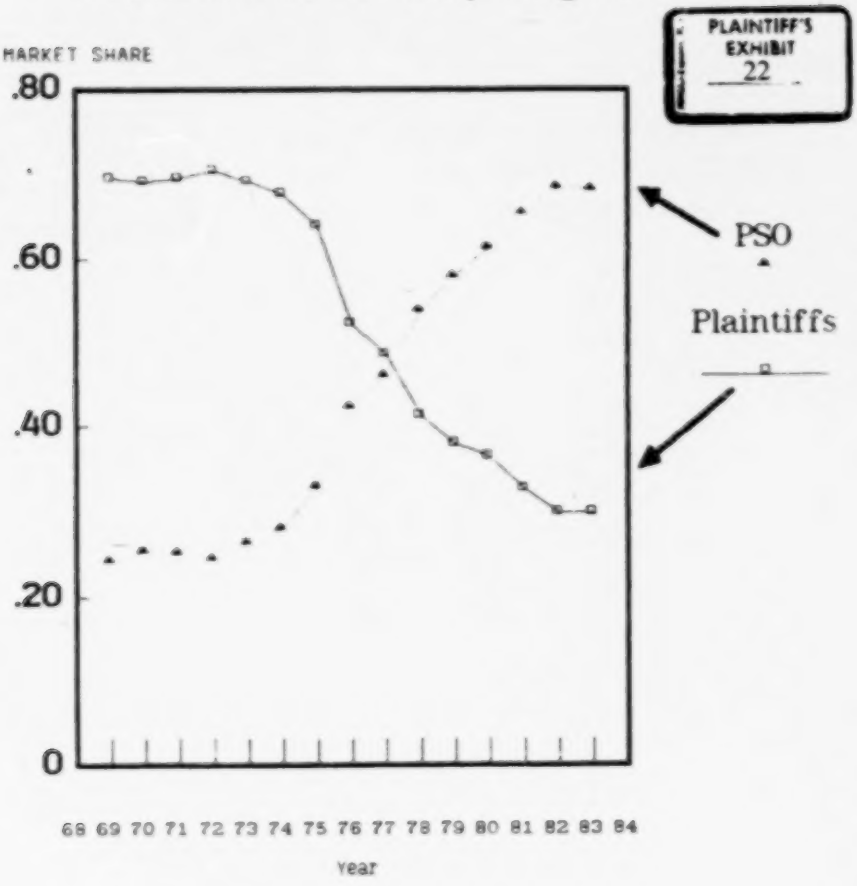
Tuesday, October 2, 1984

The clerk is directed to issue the following orders:

55,320 (consolidated with 55,346 and 55,354) Public Service Company of Oklahoma v. The State of Oklahoma. Rehearing as to Part VI of the majority opinion denied.
CONCUR: Simms, V.C.J., Hodges, Doolin, Hargrave, Kauger, JJ.
DISSENT: Barnes, C.J., Lavender, Opala, JJ.

MARKET SHARES-METRO TULSA

175w/400w/sodium vapor lights



Market Shares-Metro Tulsa
175w/400w/sodium vapor
Commercial & industrial

	LL	PR	KN	SE	PSO	
69	0.2372	0.1336	0.2321	0.0925	0.2423	
70	0.2028	0.1689	0.2062	0.1132	0.2523	
71	0.1912	0.1620	0.2014	0.1405	0.2501	
72	0.2015	0.1616	0.1869	0.1555	0.2428	
73	0.1953	0.1482	0.1739	0.1717	0.2620	
74	0.1987	0.1358	0.1683	0.1731	0.2780	
75	0.1973	0.1323	0.1447	0.1631	0.3276	.25458031365-avg.69-74
76	0.1754	0.1047	0.1118	0.1295	0.4207	
77	0.1658	0.0945	0.0984	0.1266	0.4584	
78	0.1441	0.0773	0.0828	0.1111	0.5351	
79	0.1384	0.0732	0.0789	0.1019	0.5645	
80	0.1326	0.0747	0.0763	0.0999	0.5949	
81	0.1412	0.0631	0.0674	0.0903	0.6182	
82	0.1344	0.0541	0.0614	0.0824	0.6491	
83	0.1348	0.0514	0.0623	0.0806	0.6493	

Supreme Court, U.S.
FILED
DEC 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-785

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LEASE LIGHTS, INC., JACK R. SEAY, d/b/a SEAY ELECTRIC COMPANY, KNIGHT LIGHTS COMPANY, INC., and PROTECTIVE LIGHTING, INC.,
Petitioners,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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December 14, 1988

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

1. Is a public utility's compliance with two tariffs established by the Oklahoma Corporation Commission from 1975 to 1984 immune under the state action doctrine even though a state court prospectively overturned one of the tariffs in 1984?

2. Is the lower court judgment sustainable on the independent grounds that a public utility's implementation of petitioned-for tariffs is immune under the *Noerr-Pennington* doctrine and that plaintiffs below failed to prove the substantive elements of attempted monopolization in any event?

RULE 28.1 STATEMENT

Pursuant to Rule 28.1 of this Court, Respondent Public Service Company of Oklahoma states that it is a subsidiary of Central and South West Corporation, a public utility holding company. Central and South West Corporation is also the parent company of the following companies which have outstanding preferred stock: Central Power and Light Company, Southwestern Electric Power Company, and West Texas Utilities Company. Central and South West Corporation also owns an interest in CSW Leasing, Inc., a joint venture with CIT Group/Capital Financing, Inc., a subsidiary of Manufacturers Hanover Corporation.

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P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 203.2a (Supp. 1988) 18n.13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-785

LEASE LIGHTS, INC., JACK R. SEAY, d/b/a SEAY ELECTRIC COMPANY, KNIGHT LIGHTS COMPANY, INC., and PROTECTIVE LIGHTING, INC.,
Petitioners,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners, electrical contractors, brought this action against respondent, a regulated electric utility, charging that the utility had attempted to monopolize the outdoor lighting business in Tulsa, Oklahoma, by raising the rate it charged the contractors for the electricity used in their lighting service, while lowering the rate it charged the public for its competing lighting service. Since both rates had been established and supervised by the Oklahoma Corporation Com-

mission, the Court of Appeals unanimously held that the challenged rates were immune under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).

1. *Background.* Respondent, Public Service Company of Oklahoma ("PSO"), is a regulated public utility providing electric service in eastern and southwestern Oklahoma. A-2.[1] PSO's rates, territory and services have been comprehensively regulated by the Oklahoma Corporation Commission since 1913. Tr. 1051.[2]

For at least 20 years, the Commission has uniformly regulated the outdoor lighting services of PSO and of all 33 other regulated electric utilities in Oklahoma. A-7.[3] The Commission has determined that in Oklahoma, utility-provided outdoor lighting enhances public safety and balances the electric system load.[4]

---

[1] The opinion of the Court of Appeals is appended to the Petition as Appendix A and is referred to herein by the page number of that Appendix.

[2] The Commission is an independent agency of the state created by the State Constitution and governed by three members elected by the people for six year terms, subject to removal for cause and to state mandated open meeting and open records laws. Okla. Const. art. VIII, § 1, art. IX, § 15; Okla. Stat. Ann. tit. 25, §§ 301-14 (West 1987); Okla. Stat. Ann. tit. 51, §§ 24A.17, 54 (West 1988).

[3] This includes three other investor-owned electric utilities and 30 rural electric cooperatives. Appendix A to the Brief of Public Service Company of Oklahoma in the Court of Appeals. A copy of these Appendices has been lodged with the Clerk and they are hereinafter referred to as "C.A.App.".

[4] *See, e.g., Oklahoma Gas and Elec. Co.*, Oklahoma Corp. Comm'n, Cause No. 29450, Order No. 290658 (Dec. 20, 1985) (C.A.App. M) at 9-10.

The record contains 47 tariffs for PSO's outdoor lighting services which were approved by the Commission from 1959-1984. *See* Appendix I. By at least 1968 the Commission had also authorized a special tariff of $10 per year for PSO to sell electricity to competing outdoor lighting contractors in the City of Tulsa, such as petitioners. App. I-3 (no. 11). No special tariff for a competing outdoor lighting service has ever been authorized by the Commission for the other 33 electric utilities in the state. Tr. 1584; Pet. 4, 17. From 1968 until May, 1975, petitioners enjoyed the benefits of this flat $10 per year electricity charge. Tr. 17-18.

2. *The Commission's 1975 "Atomic Bomb" Rate Order.* Prior to 1975, PSO had accumulated over 180 different tariffs, many of which imposed different rates for the same services in different areas. In May, 1975, the Commission ordered PSO to reduce the number of its tariffs to 9 and eliminate the disparity in rates because the pre-1975 rate structure "is causing confusion, unnecessary expense" and "possibly unfair discrimination." The Commission concluded that the restructuring "into nine rates is absolutely necessary and clearly in the public interest." D.Ex.5(a) (C.A.App. C) at 4-5; Tr. 1576. As the Court of Appeals found, one important consequence of this restructuring was to replace "the flat annual fee [of $10 per year for petitioners] with an outdoor metered rate." A-2. This effectively raised the average charge for electricity used by petitioners in their lighting service by approximately 79%. Tr. 24-25.

Similar restructuring was required to equalize the rates among various geographic areas. Prior to the Commission's May, 1975 Order, PSO had, for example, lower outdoor lighting rates in rural areas

than in urban areas. Tr. 27. In response to the Commission's directive that the rates be equalized, PSO requested that both rates be set at $3.95 for a 175 watt light. Tr. 1579-80, 1599. "[T]he Commission conducted three days of public hearings involving extensive testimony and over 100 exhibits." A-7. Following the hearing, "*the Commission rejected PSO's request and chose instead to reduce PSO's rate to $3.85.*" *Id.* (emphasis added); Tr. 1599-600. The Commission thereafter denied motions for rehearing, the state supreme court affirmed the Commission's Order and this Court denied review. *Chickasha Cotton Oil Co. v. Corporation Comm'n*, 562 P.2d 507 (Okla.), *cert. denied*, 434 U.S. 829 (1977).

Petitioners brought this action in 1977 charging that the May, 1975, rate Order "was the economic equivalent of an 'atomic bomb'." A-2; Tr. 436, 470. They claimed that by raising their cost of electricity by 79% while lowering the price of PSO's competing lighting service by 4%, the rates established by the Order "killed" them. Tr. 478. Although petitioners were aware of the Commission's 1975 rate proceedings, they testified that they "neglected to go to the Corporation Commission and complain." *Id.*[5]

3. *Subsequent Action By The Oklahoma Corporation Commission.* In 1980, following notice and a second hearing, the Commission reconsidered PSO's outdoor

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[5] In an *amicus curiae* brief filed in the District Court on August 10, 1978, the Commission stated that: "The Commission after due study, consideration and investigation has concluded that it is in the 'public interest' that electric utilities be required to provide outdoor lights to those customers who request it." *Amicus Curiae* Brief of Oklahoma Corporation Commission at 3.

lighting tariffs. Although petitioners again neglected to participate before the Commission, another intervenor argued on their behalf, after the evidentiary record had closed, that PSO's outdoor lighting rates should be decontrolled.

On May 7, 1980, the Commission rejected this contention, holding that "the contractors (plaintiffs in the District Court Case) provide outdoor lighting to commercial and industrial interests," but not to residential customers. D.Ex.5(c) (C.A.App. C) at 6. "There is little doubt that the residential user first and foremost has a public interest to be protected — namely, health, safety and welfare by the provision of outdoor security lighting." *Id.* The Commission also found that there are "economic as well as health and safety benefits" in utility-provided lighting to commercial/industrial users. *Id.* Finally, the Commission determined that "it is in the public interest that this lighting be provided at a reasonable cost, based upon the cost of service, to all customer classes, without discrimination among classes." *Id.* As a result, the Commission concluded that PSO's lighting service is "in the public interest" and that its lighting assets "should remain in rate base." *Id.*

Pursuant to this 1980 Commission Order, PSO continued to comply with Commission-prescribed lighting rates. In 1984, the Supreme Court of Oklahoma reversed the Commission's 1980 rate Order in part, on the basis that PSO's lighting service "is not used or useful to the ratepayers as a whole and thus its investment may not be included in its general rate base." *Public Service Co. of Okla. v. Oklahoma Corp. Comm'n*, 688 P.2d 1274, 1281 (Okla. Dec. 27, 1983, as corrected Oct. 1, 1984). This was the first and only

time that a Commission-approved outdoor lighting tariff for any of the 34 regulated electric utilities in the state had ever been overturned. The effect of this decision was to direct the Commission to decontrol the rates for PSO's outdoor lighting service prospectively, which it did by Order entered in April, 1985. A-7n.3.

Following the state court's decision, however, the Commission has continued to regulate the rates for the outdoor lighting services of the other 33 electric utilities in the state. A-7. Indeed, after PSO's lighting service was decontrolled, the Commission reconfirmed state policy to regulate utility-provided outdoor lighting services in the case of PSO's neighboring utility. The Commission distinguished the state court decision as based upon the absence of record evidence and held that outdoor lighting "improves the system load factor and security lights are a benefit to the public as a crime deterrent."[6]

4. *Proceedings Below.* The first trial of this action ended in a directed verdict for PSO for failure to prove a sufficient nexus to interstate commerce. The Court of Appeals reversed. 701 F.2d 794 (1983). The second trial ended in judgment for plaintiffs for over $2.5 million, including treble damages and costs. The trial court denied PSO's motions for directed verdict and judgment notwithstanding the verdict. In June, 1988, by unanimous decision, the Court of Appeals reversed, holding that the core conduct in question was immune under the state action doctrine, that there was insufficient proof of non-immune conduct to sustain the judgment, and that plaintiffs had failed

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[6] A-8n.4; *Oklahoma Gas and Elec. Co.* (C.A. App. M) at 9-10.

to prove specific intent to monopolize in any event. A-1.

Relying on *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), the Court of Appeals concluded that Oklahoma law clearly articulated state policy to displace competition with regulation of PSO's electricity and outdoor lighting rates; that the Commission had actually established the challenged rates and actively supervised PSO's compliance; and that the 1984 decision of the state court reversing the Commission's 1980 outdoor lighting tariff "did not alter PSO's responsibility to comply with rates mandated by the Commission before 1984." A-7.

In an *amicus curiae* brief filed in the Court of Appeals on September 25, 1986, the Commission stated that: utility-provided outdoor lighting "is in the public interest because it may deter crime and improve the system load factor" (Br. 2); the Commission had established and supervised PSO's electricity and outdoor lighting rates from 1975 to 1985 and "PSO was required by state law to charge the approved rates" (Br. 3); and the 1984 state court decision "did not alter the duty of PSO to have complied with those rates prior to that time." Br. 4.

REASONS WHY THE WRIT SHOULD BE DENIED

I. The Court Of Appeals Decision Is Correct And Consistent With The Decisions Of This Court.

As the Court of Appeals correctly held, the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943) protects private parties when "1) the challenged behavior is sanctioned by a clearly articulated and affirmatively expressed state policy, and 2) the

state actively supervises the private anticompetitive conduct at issue." A-4.

In applying this test in *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48 (1985), this Court emphasized that in order to qualify for immunity, a private party "need not 'point to a specific, detailed legislative authorization' for its challenged conduct" so long as "the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure." *Id.* at 64 (citations omitted). The Court also noted that state agencies are designed to deal with issues "unforseeable to, or outside the competence of the legislature" and if greater specificity were required, it would "diminish, if not destroy" the usefulness of such agencies in effectuating state policy. *Id.*

For these reasons, even where a state statute did not refer to the challenged conduct, this Court held in *Southern Motor* that by conferring the power to set rates, the legislature made clear its intent to displace competition with regulation. *Id.* As the Court concluded, where the details were left to the agency which "has exercised its discretion by actively encouraging" the challenged conduct, "[w]e do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of *Parker* immunity." *Id.*

As the following discussion demonstrates, the Court of Appeals correctly applied this law to the circumstances present here.

A. Oklahoma Law Clearly Articulated State Policy to Displace Competition in Rates Charged by Electric Utilities for Electricity and for Outdoor Lighting Services.

Under Oklahoma law, "the legislature has given the Commission general supervision over all public utilities that supply 'the production, transmission, delivery, or furnishing of heat *or light* with gas [and the] . . . electric current for *light*, heat or power'." A-6; Okla. Stat. Ann. tit. 17, §§ 151-55 (West 1986).

> Within this domain, the Commission has the power to prescribe "rules, requirements and regulations, affecting [the utilities'] services, operation, and the management and conduct of their business." Okla. Stat. tit. 17, § 152. The Commission also establishes and enforces rates "as may be reasonable and just." Okla. Const. art. IX, § 18. The constitution states that the authority of the Commission to prescribe these rates is paramount; rates which are inconsistent with the Commission's rates "shall be unlawful and void." *Id.* To carry out this mandate, the Commission may exercise "full visitorial and inquisitorial power to examine . . . public utilities . . . ." Okla. Stat. tit. 17, § 152. Furthermore, the Commission must periodically conduct detailed rate investigations and continually oversee public utilities' compliance with rate schedules which include fuel adjustment clauses. Okla. Stat. tit. 17, §§ 252, 263.

A-6. Based on these clearly articulated authorities, the lower court properly held that the State of Oklahoma had manifested its intent to displace competi-

tion in the rates charged by regulated electric utilities for electricity and for outdoor lighting services. *Id.*[7]

The correctness of the lower court's decision is confirmed by other Oklahoma laws and by the practice of the Oklahoma Corporation Commission. For example, Oklahoma law also requires that "electric light and power companies" file tax returns with the state describing, *inter alia*, "the total amount of poles, wire and other *equipment for the transportation or transmission of light*, heat and power . . . ." Okla. Stat. Ann. tit. 68, § 2449 (West 1966) (emphasis added). Similarly, the Oklahoma statutes grant any company organized "*to furnish light*, heat or power *by electricity* or gas" the right to exercise the power of eminent domain. Okla. Stat. Ann. tit. 27, § 7 (West 1976). Thus, although not required for immunity under the state action doctrine, the legislature has expressly recognized that regulated electric utilities may furnish lighting services. The Commission's consistent exercise of this power for over two decades confirms this interpretation.[8]

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[7] Petitioners' claim (Pet. 8) that the Court of Appeals also cited the definition of a "public service corporation" instead of a "public utility," is irrelevant, and, as the text demonstrates, the statement that "the state constitution and state statutes . . . confer no power . . . to regulate outdoor lighting" (Pet. 14) is flatly wrong.

[8] The fact that the legislature has amended the governing statutes (1971 Okla. Sess. Laws ch. 26, § 1, ch. 322, § 1 (amending Okla. Stat. tit. 17, § 151)) without changing the Commission's regulation of outdoor lighting further validates its interpretation. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986) (the legislature's amendment of "a statute giving rise to a longstanding administrative interpretation without pertinent change" is persuasive evidence of legislative intent); *see also*

Indeed, here, as the Court of Appeals found (A-9), the case for immunity is stronger than that found sufficient in *Southern Motor*. Here, the challenged conduct was compelled; in *Southern Motor*, the challenged conduct was "allowed" by the state commission (471 U.S. at 51). Here, rates became effective only after formal hearings and an independent written determination by the Commission; in *Southern Motor*, the rate-setting process was passive—"[a] proposed rate becomes effective if the state agency takes no action within a specified period of time" (471 U.S. at 50-51). Here, as the lower court concluded, "*the lower rate charged by PSO . . . , which plaintiffs claim destroyed their business, was compelled by an independent decision of the Commission that PSO could not disobey.*" A-7 (emphasis added).

In addition, the facts do not support petitioners' assertion that the Commission had engaged in "unauthorized bogus regulatory acts." Pet. 14. There is no claim of any dishonesty by PSO or the Commission in this case and the facts here are completely distinguishable from those in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), on which petitioners rely.[9] The

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Oral Roberts Univ. v. Oklahoma Tax Comm'n, 714 P.2d 1013, 1016 (Okla. 1985) ("the legislature *adopts* an administrative construction of a statute when, subsequent to such construction, it amends the statute or re-enacts it without overriding such construction").

[9] Petitioners seriously misrepresent the law of state action immunity. For example, they quote from one of the opinions in *Cantor* (428 U.S. at 600) which they represent (Pet. 18) as "the law as laid down by this Court" when it in fact is taken from the plurality opinion, not the Court's opinion. *See Cantor*, 428 U.S. at 600. They also quote *dicta* (Pet. 13) from the D.C. Circuit decision in *Feldman v. Gardner*, 661 F.2d 1295 (D.C. Cir. 1981)

light bulb give-away program at issue in *Cantor* predated state regulation, continued without any affirmative addressing of the issue by the state, was not the practice of any other regulated utility in the state and was undertaken voluntarily by the utility. *Id.* at 583-85. Here, in contrast, rates for outdoor lighting service were established by the Commission long after the regulatory regime was in place; these rates were affirmatively addressed by the Commission in public hearings and written rate orders (D.Exs. 4, 5 (C.A.App. B, C)); Commission regulation of outdoor lighting is the uniform practice for regulated utilities in Oklahoma; and *it is undisputed that PSO was compelled to obey the challenged rate Orders at the time.*

For all of these reasons, the Court of Appeals correctly held that Oklahoma law reflected the state's intent to displace competitive forces in the setting of rates for electricity and outdoor lighting services provided by regulated electric utilities.

B. The Oklahoma Corporation Commission Exercised Active Supervision Over These Rates.

As this Court explained in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985), "[t]he requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." In *Patrick v. Burget*, 108 S. Ct. 1658, 1663 (1988), the Court elaborated that the supervision requirement assures that immunity will protect private conduct only when "in the judgment of the State, [it] actually further[s] state regulatory

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which this Court has vacated. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

policies." Thus, "the State [must] exercise ultimate control over the challenged anticompetitive conduct." *Id.*

In *Patrick*, the Court rejected immunity because hospital privileges had been denied in the first instance by private parties and there was no effective mechanism for state reexamination. In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) and *324 Liquor Corp. v. Duffy*, 107 S. Ct. 720 (1987), the Court rejected immunity because neither California nor New York examined the privately posted wine and liquor prices to determine whether they were consistent with state policy. Accordingly, *Patrick, Midcal* and *Duffy* are all different from the present case because here the state agency determined the challenged rates in the first place. This alone satisfies the supervision requirement.

However, the case for immunity is even stronger here because, as the Court of Appeals correctly found, the Commission has used its authority "to closely supervise the outdoor lighting services provided by public utilities, including PSO." A-7. For example, "[f]rom 1977 to 1985, PSO submitted monthly reports to the Commission of its compliance with the fuel adjustment clause in its outdoor lighting rates." *Id.* Thus, even after the Commission determined the permissible rate, it closely monitored PSO's performance to assure compliance.[10]

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[10] In the case of a utility which does not obey an approved tariff, the Commission has the statutory authority to impose fines of $500 per day (Okla. Stat. Ann. tit 17, § 1 (West 1986)), to hold the utility in contempt (*id.* § 2) and to order refunds (*id.* § 121).

Petitioners' argument that *Parker* requires regulation of all lighting competitors is in error. Pet. 17. *The issue here is whether the rates charged by the regulated utility are immune.* So long as the state's action in setting the utility's rates meets the test of *Southern Motor*, the state is free to displace any portion of competition which it determines serves state policy. On petitioners' theory, immunity would—quite perversely—be available only when the state had eliminated all competition. *Cf. Southern Motor*, 471 U.S. at 61.

Finally, petitioners' reliance on the 1978 deposition testimony of the General Counsel of the Commission and one Commissioner, to show that the Commission failed to take into account competitive factors, is also misplaced. Pet. 16. Immunity depends on the state assuring that the challenged act serves state policy. It does not depend on the state's providing a mini-antitrust trial to assess competitive impacts. The entire thrust of state action immunity is that the states are free to implement their own public policies even if they are anti-competitive. *Cf. Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133 (1978). In any event, petitioners' arguments were expressly considered and rejected by the Commission in 1980 in favor of the state policy of promoting security and balancing the system load factor. This, of course, is precisely the role that state regulatory commissions are intended to play.

For all of these reasons, the Court of Appeals correctly determined that the challenged rates were supervised by the state.

C. The State Court's Later Decision Overturning the Commission's Outdoor Lighting Order Does Not Diminish the Applicability of State Action Immunity.

The Court of Appeals correctly concluded that the 1984 state court decision did not alter PSO's duty to comply with Commission-mandated outdoor lighting rates in effect prior to that time. A-7. Under these circumstances, the Court of Appeals reasoned that immunity should be available because:

> there should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized. *See* P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.4b, at 132 (Supp. 1987). To rule otherwise would require regulated industries to seek judicial review of every order of a regulatory agency to ensure that compliance does not later subject them to antitrust liability.

A-8. The court further held that there was no reason to anticipate the state court's ruling because:

> [u]ntil the 1984 decision, the Oklahoma Supreme Court had never overturned a decision by the Commission involving the outdoor lighting of a regulated utility. Indeed, the court affirmed the 1975 "atomic bomb" order challenged in the instant case . . . .

Id. In addition, the lower court pointed out that the 1984 state court decision "may reasonably be interpreted as only requiring evidence that outdoor lighting is useful to ratepayers, rather than as a limit on the Commission's jurisdiction . . . ." A-8n.4. This, of

course, is how the Commission has interpreted it. *See supra* p. 6.

Several additional factors bolster the lower court's decision on this point. The Commission determined the $3.85 "atomic bomb" rate. Petitioners neglected to complain about it during the 1975 rate proceedings, or to appeal that Order or to obtain a stay of the Order pending appeal, as Oklahoma law allows. *See* Okla. Const. art. IX, § 21. The Supreme Court of Oklahoma affirmed that rate Order in 1977. When petitioners later complained through an intervenor in the 1980 rate proceedings, the Commission ruled against them. Thus, by the time the state court announced its corrected decision on October 1, 1984, PSO had complied with the apparently lawful orders of the Commission for over 9 years.[11]

In these circumstances, there are two special reasons for immunity. First, "fairness for the private defendant caught in the conflicting structures of a federal system" strongly supports immunity here. I P. Areeda & D. Turner, *Antitrust Law* ¶ 217b2, at 109 (1978) (emphasis added). "The considerations of fairness are the obvious ones. One should not be punished with treble damages for acts reasonably thought lawful when committed." *Id.*

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[11] Petitioners' contention that this Court is "required to give preclusive effect" to the state court ruling (Pet. 5) in determining state action immunity is in error. *Town of Hallie*, 471 U.S. at 44n.8 (although potentially relevant, a state court "opinion does not, of course, decide . . . immunity under the *federal* antitrust laws"). Further, the contention that PSO is collaterally estopped by the state court decision (Pet. 6) is inapposite. The issue in this litigation is whether PSO is immune for conduct in compliance with Commission orders *prior* to the state court decision.

Second, the state's interest in implementation of its regulatory program extends beyond merely obtaining obedience to its regulatory command. The state also seeks "ungrudging compliance . . . and voluntary participation in its regulatory structures." *Id.* If private parties believe they risk unfair treatment by being caught between the "jaws" of state regulatory policy and antitrust treble damages, then their cooperativeness with the regulatory program will undoubtedly be chilled. *See Hoover v. Ronwin*, 466 U.S. 558, 580n.34 (1984) ("the threat of being sued for damages" will deter voluntary cooperation). If voluntary compliance were undermined in this manner, then every routine state agency proceeding could be transformed into a lawyer's marathon of protest and appeal which would stymie state policy as effectively as the reversal of *Parker* itself.

For these reasons, the Court of Appeals correctly held that the 1984 state court decision did not diminish PSO's immunity.

II. The Court Of Appeals Decision Is Supportable On Alternative Grounds.

The Court of Appeals' decision also does not warrant review by this Court because it is supportable on four alternative grounds.

A. *Noerr-Pennington Immunity.* Respondent's conduct in petitioning for and implementing the challenged rates is immune under the *Noerr-Pennington* doctrine.[12] As the Fifth Circuit Court of Appeals has

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[12] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

recognized, the First Amendment right to petition "would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success." *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1505 (1985) (Higginbotham, J.). Moreover, *Noerr-Pennington* immunity applies even if the agency action is later overturned.[13] *Id.* at 1499-1500.

B. *No Specific Intent to Monopolize.* To establish their attempted monopolization claim, petitioners were required to prove, and the Court of Appeals correctly held that they "failed to show . . . a specific intent to monopolize . . . ." A-11.

C. *No Dangerous Probability of Success.* Petitioners were also required to show that "there existed a dangerous probability of PSO succeeding in monopolizing the relevant market by proving it had the ability to control prices and exclude competition." A-12n.6. Petitioners also failed to prove this element which, as the Court of Appeals noted, "would have been a very difficult task," because the Commission regulated PSO's rates. *Id.*

D. *No Relevant Product Market.* Finally, the petitioners failed to prove that the market consisted of leased 175 and 400 watt lights and excluded all purchased lights and all other types and sizes of lights. The evidence established that purchased and leased

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[13] *See also Subscription Television, Inc. v. Southern Cal. Theater Owners Ass'n*, 576 F.2d 230 (9th Cir. 1978); P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 203.2a, at 28 (Supp. 1988).

lights are reasonably interchangeable,[14] as are 175, 400 and 1000 watt lights.[15] Thus, in the market defined by the evidence, PSO had less than a 1.4% share,[16] which is insufficient as a matter of law to support a claim of attempted monopolization.[17]

III. The Court Of Appeals Decision Is Based On Unusual Facts Which Limit Its Significance.

This Court should also deny the petition because the decision below is based on unusual facts and will have little practical significance beyond the immediate parties. The state uniformly regulated all 34 utility outdoor lighting services and only one of those has ever been overturned. Moreover, this one utility tariff

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[14] *See, e.g., United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). More than 96% of the lights were purchased, not leased. Tr. 1166-67; D.Ex.11(B) (C.A.App. F). Moreover, on at least eighteen occasions, petitioners' own customers changed from leasing to purchasing lights. Tr. 1483-90, D.Ex.17(a) (C.A.App. G) at 1-11; D.Ex.17(b) (C.A.App. G) at 7-17, 20-25, 31-41; D.Ex.17(c) (C.A.App. G) at 6-9; D.Ex.17(d) (C.A.App. G) at 3-7, 12-14. Petitioners' lease agreements often included an option to purchase at the end of the lease, which at least some of petitioners' customers exercised. Tr. 579, 581; D.Ex.17(b) (C.A.App. G) at 26, 35-37.

[15] On at least eight occasions, petitioners' own customers replaced either 175 or 400 watt lights with 1000 watt lights. Tr. 1474-82, 1520-21; D.Ex.18(a) (C.A.App. L) at 1-20; D.Ex.18(b) (C.A.App. L) at 3-6. Petitioners also replaced 1000 watt lights with 400 watt lights. Tr. 1522-23, D.Ex.18(b) (C.A.App. L) at 7-9.

[16] Tr. 1773-74.

[17] *See, e.g., Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 429 (D.C. Cir.), *cert. denied*, 107 S. Ct. 181 (1986) ("[a]s a matter of law, a market share [from 1.8 to 4.5%] cannot support a monopolization claim.").

had been subject to two formal Commission proceedings and had been affirmed by the state supreme court once before it was overturned.

In addition, the Corporation Commission has never authorized a special electricity rate for competing providers of outdoor lighting services for any of the other 33 regulated electric utilities in the state. Pet. 4, 17. Finally, even if petitioners were correct about the absence of immunity for the outdoor lighting rate, the rate for electricity which raised their costs by 79% would still be immune.

IV. The Court Of Appeals Decision Does Not Warrant Review By This Court Merely To Reexamine The Evidence Or Inferences To Be Drawn From It.

Petitioners argue extensively about the facts of this case in an effort to cloud the applicability of the state action doctrine to PSO's challenged rates. *See, e.g.*, Pet. 19. In doing so, they commit two serious errors which underscore the inappropriateness of review by this Court. First, they in effect are asking this Court "merely to review the evidence or inferences drawn from it," which this Court has long declared it will not do. *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938).

Second, petitioners seriously misstate the evidence of record. Petitioners quote the testimony of PSO's Vice President out of context and offer it for the proposition that PSO "decides what it wants to charge." Pet. 19. In fact, the referenced testimony clearly establishes that PSO's rates are set by the

Commission.[18] The record also flatly contradicts petitioners' claim (Pet. 19) that PSO did not have approved outdoor lighting rates before 1975. PSO had Commission-approved outdoor lighting rates at least as early as 1959, and a Commission-approved rate for commercial and industrial outdoor lighting as early as 1968. *See* App. I-1 (Nos. 1,2); App. I-3 (Nos. 9,10,11). Petitioners' own witness testified that PSO's outdoor lighting rates were regulated by the Commission since at least 1972. Tr. 904-05.

Petitioners' claim (Pet. 19) that in 1967 PSO was found to be furnishing service without Commission approval is also in error. The witness referred to by petitioners could not identify any PSO outdoor lighting rates which had not been approved. Tr. 860. Finally, petitioners' other contentions that certain rates were not filed or approved, are not supported by citations to the record, and, in any event, are contradicted by the 47 approved outdoor lighting tariffs summarized at Appendix I, which cover PSO's service from 1959-1984.

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[18] Q: Now then, in the early days when you first supplied outdoor lighting will you tell the court and jury how the rates for outdoor lighting were created? How did you decide what to charge?

A: In the early days I, Mr. Walker, cannot answer that because the rate department decided what it was to charge, and I as a service engineer took the rates they had developed and had priced and had presented to the Commission, *and had been approved by the Commission*, and this is what I worked with was the finished product, if you please.

Tr. 1056-57 (emphasis added).

Finally, these unsupported factual contentions are largely irrelevant. There is no dispute that the "atomic bomb" rates which are the heart of the petitioners' case were established by the Commission. A-7.

CONCLUSION

For all of the foregoing reasons, Respondent Public Service Company of Oklahoma prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

APPENDIX I

OUTDOOR LIGHTING TARIFFS OF PUBLIC SERVICE COMPANY OF OKLAHOMA APPROVED BY THE OKLAHOMA CORPORATION COMMISSION

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
1. 1/13/59	Existing customers-yard lighting	All PSO urban and suburban areas	$3/$2.50 per month	22
2. 1/13/59	Existing customers-yard lighting	All PSO rural areas	$3/$2.50 per month	24
3. 5/3/62	All existing customers	All areas	$4 per month	26
4. 12/28/62	Existing customers-yard lighting-closed to new customers	All PSO urban and suburban areas	$3/$2.50 per month	23

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
5. 12/28/62	Existing customers-yard lighting-closed to new customers	All PSO rural areas	$3/$2.50 per month	25
6. 12/28/62	Existing customers	All areas	$4 per month	27
7. 8/11/64	Existing residential customers	All areas	$2.75/$3.25 per month	28
8. 5/31/66	Existing residential customers	All areas	$2.75/$3.25 per month	30

9. 11/18/68	Existing commercial and industrial customers	Tulsa urban and suburban areas	$4 per month	41
10. 11/18/68	Existing commercial and industrial customers	All areas except Tulsa urban and suburban	$2.75/$3.25/ $5.10 per month	47
11. 11/18/68	Electrical contractors leasing outdoor lighting for commercial and industrial establishments	Urban Tulsa area	$10/$25/$60 per year	7
12. 3/22/72	All customers	Jenks and Vicinity	$2.50 per month	35
13. 7/18/74	Residential customers	All areas	$2.75/$3.25 per month	32

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
14. 7/18/74	All customers	Jenks and Vicinity	$2.50 per month	37
15. 7/18/74	Existing commercial and industrial customers	Tulsa urban and suburban areas	$4 per month	42
16. 7/18/74	Amending commercial and industrial customer rate	All areas except Tulsa urban and suburban areas	Amend terms of payment and fuel clause	49

17. 7/18/74	Electrical contractors leasing outdoor lighting for commercial and industrial establishments	Urban Tulsa area	$10/$25/$60 per year	8	
18. 5/29/75	Any customer-metered outdoor lighting	All areas	2.188¢ per kilowatthour	10	
19. 5/29/75	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$3.35-$7.86 per month	51	
20. 5/29/75	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$4.41-$24.99 per month	67	

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
21. 9/29/77	Any customer-metered outdoor lighting	All areas	2.826¢ per kilowatthour	13
22. 9/29/77	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$3.78-$8.80 per month	55
23. 9/29/77	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$4.73-$27.27 per month	71

24.	7/31/78	Any customer-metered outdoor lighting	All areas	2.826¢ per kilowatthour	16
25.	7/31/78	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$3.78-$8.80 per month	59
26.	7/31/78	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$4.73-$27.27 per month	75
27.	12/15/80	Any customer-metered outdoor lighting	All areas	2.826¢ per kilowatthour	19

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
28. 12/15/80	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$3.78-$8.80 per month	63
29. 12/15/80	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$4.73-$27.27 per month	79
30. 10/2/81	Any customer-metered outdoor lighting	All areas	2.826¢ per kilowatthour	158

31. 10/2/81	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$3.78-$8.80 per month	174
32. 10/2/81	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$4.73-$27.27 per month	190
33. 1/18/82	Any customer-metered outdoor lighting	All areas	5.081¢ per kilowatthour	162
34. 1/18/82	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$5.94-$13.71 per month	178

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
35. 1/18/82	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$7.06-$41.42 per month	194
36. 6/4/82	Any customer-metered outdoor lighting	All areas	5.321¢ per kilowatthour	165
37. 6/4/82	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$6.09-$14.03 per month	181

38.	6/4/82	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$7.17-$42.19 per month	197
39.	1/24/83	Any customer-metered outdoor lighting	All areas	5.321¢ per kilowatthour	169
40.	1/24/83	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$6.09-$14.03 per month	185
41.	1/24/83	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$7.17-$42.19 per month	201

Date Approved	Customers	Areas	Rates	Defendant's Exhibit 4 Page
42. 2/24/84	Any customer-metered outdoor lighting	All areas	5.321¢ per kilowatthour	172
43. 2/24/84	Any customer-monthly rate-mercury vapor outdoor lighting	All areas	$6.09-$14.03 per month	188
44. 2/24/84	Any customer-monthly rate-sodium vapor outdoor lighting	All areas	$7.17-$42.19 per month	204

45. 2/24/84	Any customer under OCC rate schedule with fuel cost adjustment rider	All areas	Fuel cost adjustment rider	234
46. 2/24/84	Any customer under OCC rate schedule with tax adjustment rider	All areas	Tax adjustment rider	236
47. 2/24/84	Any customer under OCC rate schedule with fuel over/under recovery rider	All areas	Fuel over/under recovery rider	237

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Petitioners,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Alliance for Fair Competition ("Alliance") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

As explained more fully in the attached brief *amicus curiae*, the interest of the Alliance arises primarily from two facts. First, its members are threatened by the increasingly anticompetitive conduct of public utilities moving beyond their publicly regulated activities to private, commercial business ventures, some of which have been endorsed by the Tenth Circuit in the instant case. Second, the Eastern Oklahoma Chapter of the National Electrical Contractors Association, Inc., a founding mem-

ber of the Alliance, was a party in *Public Serv. Co. of Okla. v. Oklahoma Corp. Comm'n*, 688 P.2d 1274 (Okla. 1983), a case involving the same parties here in which the Supreme Court of Oklahoma held that outdoor lighting was not a part of the electric utility business and that it was a separate business beyond the jurisdiction of the Oklahoma Corporation Commission to regulate.

In the instant case, the Court of Appeals, relying on a strained and overreaching interpretation of the constitution of the State of Oklahoma, erroneously extended blanket antitrust immunity to the Public Service Company of Oklahoma's ("PSO") purely voluntary participation in the private, commercial leased outdoor lighting business. Moreover, ignoring PSO's anticompetitive conduct and the manifest absence of a clear intent by the State of Oklahoma to supplant competition with regulation in the leased outdoor lighting market, the Court of Appeals found that "there should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized." *Lease Lights, Inc. v. Public Serv. Co. of Okla.*, 849 F.2d 1330, 1334 (10th Cir. 1988).

Since it is likely that respondent will pursue the same line of argument in this Court, it is believed that the brief which *amicus curiae* is requesting permission to file will contain a more complete argument on those issues.

Respectfully submitted,

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Respondent.

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---

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST AND CONCERN OF THE AMICUS

Amicus curiae The Alliance for Fair Competition ("Alliance") hereby submits this brief in support of the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit. The Alliance is an umbrella organization comprised primarily of national trade associations. Its members include:

Air Conditioning Contractors of America
American Supply Association
Carolinas Electrical Contractors Association
Eastern Illinois Chapter, NECA
Michigan Chapter, ACCA
National Association of Plumbing, Heating & Cooling Contractors
National Association of Wholesalers-Distributors
National Electrical Contractors Association
Petroleum Marketers Association of America
Sheet Metal Contractors of Iowa, Inc.
Sheet Metal & Air Conditioning Contractors National Association
SMACNA Metropolitan Detroit Chapter

The Alliance and its members have made themselves available to work cooperatively with small businesses and other interested parties in an effort to eliminate unfair and anticompetitive practices by public utility companies.[1] A significant proportion of the membership of the associations comprising the Alliance are small, independent businesses.

In recent years, utilities throughout the United States have entered into a host of different businesses outside their publicly regulated activities as producers and distributors of gas and electricity. For example, utilities now sell appliances, plumbing, heating and cooling equipment, storm doors and windows, offer service contracts, make home improvements, market and service solar and other conservation devices, perform energy audits and provide a variety of other products and services. These products and services have traditionally been provided primarily by small businesses, many of which are members of the trade associations comprising the Alliance.

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[1] In July 1988, the Alliance published and began distributing to its members and the public a fifty-page handbook entitled "Confronting Unfair Utility Competition: A Blueprint for Action at the State Level."

Small, independent companies are simply unable to compete against their larger, better-financed utility competitors, particularly if some or all of the utilities' costs are cross-subsidized by the ratepayers. The basic advantages enjoyed by utilities as protected monopolies enable them to offer reduced prices for services and products by using their regulated rate-base (funded by individual ratepayers) to subsidize unregulated activities. Cross-subsidization occurs when direct or joint costs of the unregulated activity are misallocated to a utility's regulated business. *See Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 549-555 (1980) (Blackmun, J., dissenting).

Due to the protected monopoly status of public utilities, few small businesses can match the enormous, competitive advantages which utilities bring to any private, commercial business venture. The United States Small Business Administration, in two separate studies, has detailed the impact of new utility business ventures on competition in the private sector, the elements of utility subsidization of these unregulated activities, and the subtle, but powerful, advantages that public utilities enjoy over their small business competitors.[2]

The Alliance and its members are vitally interested in the Tenth Circuit's immunization of the Public Service Company of Oklahoma from antitrust liability for its purely voluntary, private business activities. The Alliance is also deeply concerned about the uniform and orderly application of the antitrust laws to discriminatory and anticompetitive conduct by public utilities, and urges reversal of the Tenth Circuit's decision.

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[2] "Utility Competition with Small Business: Recommendations for States on Utility Energy-Related Programs in the Commercial and Apartment Conservation Service Program" (1984); and "Final Report: Utility Competition with Small Business" (1986).

SUMMARY OF THE ARGUMENT

The Alliance for Fair Competition supports and endorses the arguments set forth in the Petition for Certiorari, and submits this brief *amicus curiae* to enhance and supplement those arguments.

The opinion and judgment of the Tenth Circuit expand the scope of state-action antitrust immunity. The Court of Appeals' holding subordinates the significant federal interest in vigorous private antitrust enforcement to a public utility's interest in engaging in a private, non-utility related business. The Tenth Circuit has allowed a private entity to shield its anticompetitive conduct by invoking the affirmative defense of state-action immunity, where that immunity is based upon the illegal actions of a state public service commission. According to the Tenth Circuit, a defense should be recognized extending state-action immunity to the private, commercial activities of public utility companies where they reasonably rely upon state action, even if that action is not authorized by state law. Despite this Court's frequent pronouncements on state-action immunity, such a defense has never been recognized.

For all of these reasons, elaborated upon in this brief, this Court should grant the Writ of Certiorari, reverse the Tenth Circuit and reinstate the judgment of the district court.

ARGUMENT

State-Action Immunity Is Not An Affirmative Defense To Antitrust Liability, Where A Public Utility Seeks To Protect Its Anticompetitive Conduct Through Reliance Upon The Unauthorized And Illegal Action Of A State Agency.

The Court of Appeal's opinion subordinates the federal interest in enforcing the antitrust laws to a public utility's interest in pursuing a purely private, commercial business that has been protected by the Oklahoma Corporation Commission ("the Commission"). Over many years the Commission's protection, in the form of sporadic orders and tacit approvals of tariffs which exceeded its jurisdiction, allowed the Public Service Company of Oklahoma ("PSO") to engage in a host of anticompetitive acts including refusals to deal, territorial exclusions, price manipulation and predatory pricing tactics.

The relevant market is outdoor lighting equipment—poles, lamps, etc.—leased to commercial and industrial customers (primarily for nighttime security purposes) in the City of Tulsa, Oklahoma. From 1969 to 1983, PSO's market share swelled from 24% to nearly 65%, while the plaintiffs' shares declined from nearly 24% to 13%, from 13% to 5%, from 23% to 6% and from 9% to 8% over the same period. *See* Petitioner's Appendix, at E-2. Two competitors went out of business entirely. The Commission's protection of PSO's pricing and other activities created a deteriorating competitive market for a service not offered to the public generally but to only a few commercial and industrial customers.

The starting point for the Tenth Circuit's faulty analysis is its finding that ". . . we believe there exists a clearly articulated state policy to regulate the market for leased outdoor lights." *Lease Lights, Inc. v. Public Serv. Co. of Okla.*, 849 F.2d 1330, 1333 (10th Cir. 1988). This is based upon the word "light", in that portion of Okla-

homa's constitution which confers power upon the Commission to regulate public service corporations (not public utilities) where they are defined as "all gas, electric, heat, *light* and power companies . . ." *Id.* (quoting Okla. Const. Art. IX § 34) (emphasis added by the Court of Appeals). While it may be true that state law does not have to "explicitly authorize the challenged conduct," it must at least indicate a clear intent to supplant regulation for competition there. *Lease Lights, Inc.*, 849 F.2d at 1333. There is simply no adequate support for the Court of Appeals' finding that the State of Oklahoma had clearly preferred regulation over competition in the market for leased outdoor lighting, simply because the Commission is given broad statutory authority to regulate the public business of a public utility.

The Commission allowed PSO to include within its general rate-base its investment in the outdoor lighting program despite the fact that the program served only a small proportion of the public and constituted a separate business venture not used by the ratepayers as a whole. It should have seemed obvious to the Commission that in seeking its approval of submitted tariffs, PSO was enticing the Commission to regulate conduct beyond its jurisdiction.

It was not until October 1984, however, when the obvious was finally spelled out. In the case of *Public Serv. Co. of Okla. v. Oklahoma Corp. Comm'n*, 688 P.2d 1274 (Okla. 1984), the Supreme Court of Oklahoma held that it was improper for the Commission to allow PSO to include the investment in the private business venture of leasing outdoor lighting to commercial customers within the general rate-base because it would force all ratepayers to subsidize a service used by only a few. This was analogous to the selling of appliances by a public utility. In short, the Commission had no justification to regulate this aspect of PSO's business, since it was private and not public.

Implicit in the decision of the Oklahoma Supreme Court is the clear and unmistakable message that the State of Oklahoma does not have, and never did have, any interest in regulation of the leased outdoor lighting market.

Despite the Oklahoma Supreme Court's decision, the Tenth Circuit found that PSO was still required to "comply with the rates mandated by the Commission before 1984." *Lease Lights, Inc.*, 849 F.2d 1330, 1334. As a result, the Court of Appeals held that PSO's reliance on the Commission's actions, whether those actions were lawful or not, was sufficient to confer state-action antitrust immunity upon the utility. The Tenth Circuit ruled that this immunity shielded PSO because the illegality of the "attempted state regulation is not an appropriate basis for disregarding state action immunity." *Id.* The Court of Appeals cited *Llewellyn v. Crothers*, 765 F.2d 769 (9th Cir. 1985) in support of its holding. The situation presented by the instant case, however, is not analogous to the one confronting the *Llewellyn* court. This is not an instance where the Commission has committed some procedural irregularity in the adoption of a state regulation. The Commission's orders and its tacit approvals of tariffs were not merely "ordinary errors or abuses," and, as a result, PSO could not reasonably have relied upon their obvious illegality. *Id.* at 774 (citations omitted).

The Court of Appeals' reliance upon the *Llewellyn* court's assertion that "even the constitutional invalidity of the attempted state regulation is not an appropriate basis for disregarding the immunity conferred by *Parker* [*v. Brown*, 317 U.S. 341 (1943)]," is misplaced. 765 F.2d at 774. In *Llewellyn*, as in the instant case, the respective courts of appeals mistakenly extended *Parker* immunity by allowing private, regulated entities to retain immunity in the face of illegal state regulation.

In *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the cases relied

upon by the *Llewellyn* court, the issue was whether or not state-action immunity should be afforded to governmental authorities, not private, regulated business concerns. *Preferred Communications* and *Bates* extended immunity to the sovereign acts of state governments, their political subdivisions, or their regulatory agencies. *See Preferred Communications*, 754 F.2d at 1415 (extending immunity to the actions of the City of Los Angeles); and *Bates*, 350 U.S. at 361 ("Here appellants' claims are against the State.").

Moreover, the Tenth Circuit found "there should be a defense for those reasonably relying on the appearance of legality when a state agency's exercise of power is unauthorized." *Lease Lights, Inc.*, 849 F.2d at 1334 (citing P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 212.4b, at 132 (Supp. 1987) (hereinafter "Areeda & Hovenkamp"). However, where PSO, a private business entity operating as a public utility, relies upon an action of a state agency, state-action immunity remains intact only where the agency action reasonably appears "to be lawful both in relation to the antitrust laws . . . and in relation to the scope of the agency's authority under state law." Areeda & Hovenkamp, ¶ 212.4b, at 132-33.

Even assuming the viability of a "reliance upon state action" defense for private entities, PSO's reliance upon the actions of the Commission was unreasonable. Clearly the regulation of leased outdoor lighting by the Commission, where that regulation extended only to those entities also engaged in the provision of electric power, does not reasonably appear to be a lawful method of regulation either under the antitrust laws or in relation to the scope of authority delegated to the Commission under state law.

It is well settled that when a state decides to regulate an area of economic activity, its intention must be to supplant competition with regulation in order to preclude the application of the federal antitrust laws. *See Cantor*

v. Detroit Edison Co., 428 U.S. 579, 595-96 (1976). The Commission, however, did not move to regulate the entire leased outdoor lighting market; rather it only extended its ordinary regulation of utilities to their non-public business activities. If public utilities, such as PSO, are permitted to avail themselves of state-action antitrust immunity merely by seeking state agency ratification of their non-public business activities, the antitrust laws will be eviscerated.

CONCLUSION

The Tenth Circuit has extended the reach of state-action antitrust immunity under *Parker* and its progeny by allowing a private, regulated entity to immunize itself by seeking ratification of its monopolistic behavior. If the Tenth Circuit's holding is permitted to stand, all private business undertakings of otherwise state-regulated public utilities will receive antitrust immunity regardless of the manner in which they are conducted, so long as a state agency has taken some action related to those practices. Immunity will attach even where the state agency has exceeded its authority under state law.

For the reasons expressed herein, this Court should grant the Petition for Writ of Certiorari, reverse the decision of the Court of Appeals and reinstate the judgment of the district court.

Respectfully submitted,

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Petitioners

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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REPLY BRIEF OF PETITIONER

Respondent states only that petitioners' case is based upon raising of their electric rate while lowering the rate charged to PSO lighting customers. This misstatement totally ignores the multifarious anti-competitive conduct by PSO upon which plaintiffs base their Sherman Act claims of monopoly and attempt to monopolize. There is much additional unlawful conduct, all of which is substantiated by abundant evidence more than amply sufficient to support the District Court judgment.

Acts are: (1) excluding the plaintiffs from territories and markets; (2) delaying connections to plaintiffs' lights; (3) refusing plaintiffs use of its poles located on private property and outside the city (which were not governed by municipal franchise agreements as erroneously held by the Court of Appeals); (4) taking advantage of its public-utility exemption from licensing and permit requirements to install lights on private property when the plaintiffs had the cost disadvantage of being required to employ licensed contractors and obtain permits; (5) by shifting losses in the lighting busines to non-lighting rate payers, so as to rent lights below cost and at uneconomical prices; (6) use of its monopoly in electricity to gain a competitive advantage in the lighting business. PSO's unlawful inclusion of the lighting business in its public-utility business and rate base gave it an overwhelming advantage in the use of facilities, equipment, personnel and all its many assets. It had a captive clientele consisting of 100% of potential users of lease lights who could use PSO's telephone, facilities, personnel, and billing system to obtain the private, non-utility service of lighting at a price below that which plaintiffs were able to offer.

Thus, it is clear that plaintiffs' injuries were caused not merely by rate discrimination but by PSO's unlawful wrongdoing in the market place. PSO states: "Here, rates became effective only after formal hearings and an independent written determination by the Commission." (Resp. brief p. 11). This procedure requiring an order of the Commission for every rate or tariff, indeed, is prescribed by the Commission rules. (Def. Ex. 3, Rule 5(b)). However, the rates set forth in appendix 1 to Respondent's brief were not approved by Commission orders. None of the rates listed on the first four pages of the appendix (Nos. 1 through 17) is so approved. The first approved rate for

electricity sold to Petitioners or for lights leased by PSO to its lighting customers in the market where competition exists is dated 5-29-75 (Nos. 18, 19, 20). There was not at any time an order approving a rate or tariff for the sale of electricity to electrical contractors such as petitioners. (See Def. Ex. 5 containing all Commission orders). The first rate for which an order could be produced was the 1975 rate (No. 18) which applied to any customer alike and not just light-leasing competitors of PSO.

Even if the Commission had power to regulate the light-leasing business it is clear that there was no attempt to regulate even the utility's light business before 1975. This is significant as to this case which was commenced in 1977, with the damages limitations period extending back to 1973 and evidence of conduct tending to create a monopoly extending back a decade further.

Respondent's quotation of the definition of a gas utility is meaningless, inasmuch as gas has nothing to do with this case. PSO is an electric utility whose business is defined as " . . . production, transmission, delivery or furnishing *electrical current* . . . " (emph added). *Okl. Stat. Title 17,* §151(c). It is obvious that the Legislature, by this enactment (§§151-155) giving the Commission authority to regulate *only the electricity business*, did not "clearly articulate and affirmatively express" an intent to displace competition in every field of commerce employing appliances which utilize electricity. Such a sweeping and broad result is the appalling conclusion from the utility's specious reasoning.

Respondent's overblown reliance upon the word "light" in every statute where it could be found loses sight of the clear statutory definition of an electric utility. If the electric utility monopoly could be extended to include outdoor lighting, then it

also could encompass indoor lighting, and the utility could own and rent every bulb, lamp, fixture, and associated equipment in every household, plant, and office in its service territory. Thousands of businesses who provide such equipment would be forced out because of the impossibility of competing with the favored utility.

Respondent makes an astounding analysis of the antitrust laws when it states: " . . . the state is free to displace any portion of competition which it determines serves state policy." (Br. 14).

PSO argues that a state can give it all the special advantages enjoyed by the utility in its monopoly field, including broad allocation of costs among all rate payers and an allowed rate of return on investment and clothe it with antitrust immunity simply because it is a utility having a monopoly in the electricity business while the state ignores the effect upon the market and leaves other competitors such as the petitioners to struggle on their own against each other and against the overwhelming market forces until they ultimately and certainly perish and die by the state-armored hand of the sole favored leviathan on the field of economic combat.

We do not believe the United States Supreme Court in allowing state-action immunity ever intended that the doctrine be utilized as an instrument of destruction of the many competitors for the sole benefit of the one. The rule was expressed by the plurality and not disvowed by concurring opinions in *Lafayette v. Louisiana Power & Light Co.*, 435 US 389, 413, 55 L Ed2d 364, 98S Ct 1123, (1978):

> " . . . We therefore conclude that the Parker doctrine exempts only anticompetitive conduct engaged in as an act of government by the State as sovereign, or, by its

> subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service . . . "

Immunity requires displacement of all competition in the affected area of commerce by regulation, not a favored treatment to one competitor at the expense of all other disadvantaged competitors. The rule urged by the utility would convert the Sherman Act into an engine of destruction for competition rather than its protector and the Magna Carta of free enterprise which it was intended to be.

The declared purpose of the Sherman Act is to preserve free competition among a large number of small sellers and to eliminate monopolies. *No. Pac. Ry. Co. v. U.S.*, 356 US 1, 4, 78 S Ct 514, 2 L Ed2d 545 (1958).

> " . . . this Court emphasized this policy of the Sherman Act by calling attention to the tendency of powerful business combinations to restrain competition by driving out the small dealers and worthy men whose lives have been spent therein . . . " *Von's Grocery Co. v. U.S.*, 384 US 270, 274, 16 L Ed2d 555, 86S Ct 1478 (1966).

> "antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the presevation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our individual freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. *US v. Topco Assoc.*, 405 US 596, 610, 31 L Ed2d 515, 92 S Ct 1126 (1972).

The Court of Appeals and Petitioners cite *Areeda & Hovenkamp, Antitrust Law §212.4b at 132*, but they overlook the full text which states: (as a requirement for immunity for an actor relying on authorization by a state agency) " . . . The agency's action must have reasonably appeared to be lawful . . . in relation to the scope of the agency's authority under state law . . . " It is not credible for PSO to say that it did not understand the clear import of the simple language of *17 O.S. §151(c)*. Under that statute any business outside of "production, transmission, delivery or furnishing electric current" is a separate non-utility business. Certainly, after the decision of the U.S. Supreme Court in *Cantor*—July 6, 1976 (before this suit was filed) PSO was on notice that its separate non-utility private business of lighting could not expect immunity from U.S. antitrust laws. Surely the impact of that decision rippled through the electric utility industry sufficiently to come to the knowledge of Central & Southwestern Corp., and its subsidiaries. If PSO did not know in 1976 that it was not immune, surely it learned from the Oklahoma Supreme Court decision on December 27, 1983; yet, the evidence shows that PSO's anticompetitive conduct continued up through the time of trial of this cause, May 3, 1984.

Respondent argues that the Court of Appeals decision is supportable on other grounds:

A. *Noerr-Pennington Immunity*. This affirmative defense was not raised in the pleadings, pre-trial conference, or trial; therefore it is not available. Such a defense is inapplicable in any event, for petitioners complain only of anti-competitive conduct in the market place, not petitioning for governmental action.,

B. *No specific intent to monopolize*. There was strong proof of intent to monopolize. Intent also may be inferred by

the jury. "Often no evidence of specific intent exists and inferences from conduct are necessary." *Shopping Bag of Pueblo, Inc. v. Dillon Cos.*, 783 F2d 159, 163 (CA10, 1986); *U.S. v. Empire Gas Co.*, 537 F2d, 295, 302 (CA8, 1976). Intent is not a necessary element of monopoly, which was alleged and proved. Nor is intent a necessary element of the use of monopoly in electricity to gain a competitive advantage in the lighting market " . . . Use of monopoly power 'to destroy threatened competition' is a violation of the 'attempt to monopolize' clause of §2 of the Sherman Act." *Otter Tail Power Co. v. US*, 410 US 366, 35 L Ed2d 359, 368, 93 S Ct 1022 (1973), which also was alleged and proved.

C. *No dangerous probability of success.* The record is bulging with evidence that PSO had the power to control prices and eliminate competition. At least two competitors had been eliminated. The statement of the Court of Appeals of doubt that this element could be proved is based upon that court's erroneous finding that all of the utility's conduct is clothed with immunity.

D. *No relevant product market.* This argument is nothing more than a comment on the evidence. There was evidence of market shares and damages as to every conceivable relevant market. Inasmuch as respondent filed only a motion for judgment n.o.v. and did not file a motion for new trial, the only inquiry is whether there is any evidence reasonably supporting the jury verdict.

CONCLUSION

The Court of Appeals decision that outdoor lighting is a part of the electric utility business within the regulatory power of the commission misinterprets the clear language of state con-

stitutional and statutory provisions and ignores decisions of the Oklahoma Supreme Court. The opinion, which ignores numerous decisions of the United States Supreme Court, constitutes an improper and unsound extrapolation of the doctrine of state-action immunity beyond limits clearly defined by this Court. This decision, if allowed to stand, will bring nation-wide consequences upon the enforcement of the federal antitrust laws. It will expand and accelerate the ever-increasing intrusion of regulated monopolies into fields of private competition. A writ of certiorari should issue to review the decision.

Very respectfully submitted,

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